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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

FLORIDA EAST COAST RAILWAY COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Middle District of Florida, Jacksonville Division

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JURISDICTIONAL STATEMENT

Florida East Coast Railway Company (East Coast) appeals from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered June 8, 1966, dismissing its complaint to set aside orders of the Interstate Commerce Commission (Commission) authorizing merger of the Atlantic Coast Line Railroad Company (Coast Line) and Seaboard Air Line Railroad Company (Sea-

board). East Coast submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

This is the second time this merger has been before this Court. The district court initially held the order of the Commission authorizing the merger invalid. *Florida East Coast Railway Company* v. *United States,* 242 F. Supp. 14. On appeal, this Court vacated the judgment and remanded the case for a full review of the administrative order by the district court. *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154. On remand, with one judge concurring in the result only, the district court sustained the order of the Commission and entered judgment dismissing the complaint. This appeal is from that judgment.

The opinion and judgment of the district court from which this appeal is taken are not reported and are printed as Appendix A to this statement. The opinion of this Court vacating the initial decision of the district court is reported at 382 U.S. 154 and is printed as Appendix B to this statement. The initial decision of the district court holding the order of the Commission invalid is reported at 242 F. Supp. 14 and is printed as Appendix C to this statement. The report of the Interstate Commerce Commission authorizing the merger is printed at 320 I.C.C. 122 and copies of the printed report have been supplied by East Coast for the use of the Court. The orders of the Commission dated December 2, 1963, and March 4, 1964, authorizing the merger, are printed as Appendices E and F, respectively, to this statement.

JURISDICTION

The action was brought under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 and 49 U.S.C. § 17(9) to set aside orders of the Commission entered under § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2). The judgment of the district court was entered June 8, 1966. Notice of appeal was filed August 8, 1966. The Supreme Court has jurisdiction of this appeal under 28 U.S.C. §§ 1253 and 2101(b). *McLean Trucking Co.* v. *United States,* 321 U.S. 67; *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173.

QUESTIONS PRESENTED[1]

1. Whether the Commission, in concluding that cost savings in the estimated amount of 20 million dollars obtained by eliminating the present competition between Seaboard and Coast Line constituted a public benefit that outweighed the anticompetitive consequences of the merger, properly accommodated the standards of the Interstate Commerce Act with the National Transportation Policy and the policy of the antitrust laws.

2. Whether the Commission estimated the scope and appraised the effects of the curtailment of competition which will result from the merger of the Seaboard and Coast Line as required by *McLean Trucking Co.* v. *United States,* 321 U.S. 67, when the Commission adopted the policy that the maintenance of railroad competition is irrelevant to the public interest because of the presence of competition from other forms of transport.

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[1] All points raised in the Notice of Appeal are also presented. The Questions Presented stated above sets forth the major issues.

STATUTES INVOLVED

Sections 5(2)(b), 5(2)(c), 5(2)(d), and 5 (11) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(b), 5(2)(c), 5(2)(d), and 5(11); the National Transportation Policy, 49 U.S.C. preceding § 1; and Sections 7 and 11 of the Clayton Act, 15 U.S.C. § 18 and 21 are printed in Appendix D.

STATEMENT

The merger of the Coast Line and Seaboard will significantly reduce railroad competition in the Southeast and will produce a railroad monopoly in central and western Florida. Coast Line and Seaboard now operate parallel, competing, lines of railroad. The principal rail competition experienced by each of the merging roads is provided by its merger partner. Approximately one-third of their traffic producing revenues of 130 million dollars annually is now directly competitive. After the merger, more than half of the carload freight revenues of the merged company will be derived from freight shipped between points at which the merged company will have a railroad monopoly at origin, at destination, or both. The merged company will be the only railroad available to shippers, who, in 1957, shipped over 25 billion pounds of freight (320 I.C.C. at 163, 164, 217).

Coast Line and Seaboard are prosperous railroads. Net annual income for the periods 1955 to 1962 averaged 16.4 million for Seaboard and 11.3 million for Coast Line. Traffic and revenues are increasing. Between the period 1959 to 1962, total operating revenues of Coast Line increased by 6.1 percent and revenue ton miles by 11.9 percent. For the corresponding

period, Seaboard enjoyed an operating revenue increase of 2.2 percent and an increase in ton miles of 6.2 percent. Increases in the volume and revenues of the principal commodities transported by Coast Line and Seaboard are even more impressive. Approximately 75 percent of the carload tonnage and 45 percent of the carload freight revenues of the two companies are derived from the transportation of nine groups of bulk commodities.[2] During the period 1946 to 1959, (the only period for which detailed figures were presented) the carload tonnage of Seaboard and Coast Line for these commodities increased by 100 percent, and revenues by more than 150 percent (320 I.C.C. at 148-149, 232).

Coast Line and Seaboard are two of the largest railroads in the Southeastern area of Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia. The merged company will be substantially larger than any other railroad in the Southeast.[3] It will operate more than half of the rail lines in the Southeast and more than 80 percent of the rail lines in Florida. Moreover, the merged company will control the Louisville

[2] The major commodities handled by the two roads are: Phosphate rock; Stone and rock; Pulpwood, Bituminous coal; Gravel and sand; Fertilizers, Cement, Paperboard, fiberboard, and pulpboard, and Bentonite (320 I.C.C. at 231-232).

[3] Based on 1964 data, the merged company would have combined revenues of $361,977,383 and assets of $1,095,217,741. Bureau of Accounts, ICC, Transport Statistics in The United States (1965) Part I, pp. 185, 189, 340, 346. The Southern Railway Company, which will rank next to the merged company, operates 9,045 miles of track (320 I.C.C. at 163). It had revenues in 1964 of $291,913,385, and as of December 31, 1964, assets of $941,204,305. *Id.*, Part I at pp. 341, 344.

and Nashville Railroad Company (L & N),[4] another of the large railroad systems in the Southeast (320 I.C.C. at 139, 141, 163).

The Commission approved the proposed merger. It recognized that the merger would eliminate existing competition between Seaboard and Coast Line and create a rail monopoly in parts of Florida (320 I.C.C. at 165). The Commission concluded that rail competition would remain throughout most of the Southeast after the merger, and that traffic subjected to the monopoly of the merged company was insignificant compared with the total movement of goods in the Southeast by all forms of transport (320 I.C.C. at 211). Rail competition, the Commission further found, was unnecessary because of the presence of competition from other forms of transport, notably truck and barge lines, and the protection afforded by the regulatory powers of the Commission over rail rates and practices (320 I.C.C. at 212). Any anticompetitive consequences of the merger, the Commission asserted, would be further mitigated by the conditions to be imposed on the merger[5] (320 I.C.C. at 207-208).

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[4] The L&N operates 5,696 miles of track (320 I.C.C. at 141). It had revenues during 1964 of $259,500,964, and as of December 31, 1964, assets of $902,581,311. *Transport Statistics*, Part I, pp. 263, 276.

[5] The Commission imposed 14 conditions upon the merged company (320 I.C.C. at 267-269, Appendix XI). Conditions 1-13 are intended to minimize loss of traffic by competing railroads by requiring open routes and gateways and by providing for the creation of new "reprisal routes" (320 I.C.C. at 208-209). The final condition establishes a mechanism by which East Coast and the eight other small railroads whose operations, the Commission recognized, would be severely injured, could be included in the merged company (320 I.C.C. at 210). It is the position of East Coast that, as the district court held in its initial opinion, the conditions

The Commission ultimately concluded that the anticompetitive effects of the merger were outweighed by the savings in operating expenses to the merged company of $20 million annually resulting from elimination of employees and duplicating facilities of the merging roads (320 I.C.C. at 212). It was "axiomatic", the Commission concluded, that these savings would redound to the benefit of the public in the form of improved facilities, more efficient service, and lower rates (320 I.C.C. at 206-207).

The district court, in its initial review of the Commission's order, held that antitrust policy to be given any effect whatsoever in railroad merger cases, required the Commission to determine whether the effect of a proposed merger "may be substantially to lessen competition" or "tend to create a monopoly" as those terms are used in the Clayton Act. This task, the district court held, had not been undertaken by the Commission in terms of the relevant geographic and service markets affected by the proposed merger (App. C, *infra*, pp. 61a, 63a, [illegible]).

On appeal, this Court vacated the judgment of the lower court holding that, under *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173, the Commission

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imposed on the merger uniformly assume that railroad interest is always equivalent to the public interest (App. C, *infra*, pp. 64a-65a). East Coast argued below that: (a) the establishment of "reprisal" routes for the benefit of railroads is not in the public interest; (b) the establishment of new routes and open gateways at and north of Jacksonville, Fla., does not alter the monopoly power of the merged company or restore rail competition in Florida; and (c) inclusion of East Coast and other affected railroads would extend the monopoly of the merged company, a result not supported by the Commission findings.

was not required to measure railroad mergers by the standards of the antitrust laws. The case was remanded to the district court for a full review of the administrative order and findings pursuant to the standards enunciated by this Court. "The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy.'" (App. B, *infra*, pp. 52a-53a; 382 U.S. 154)

The district court on remand sustained the Commission's orders authorizing the merger. The court held there was absolutely no doubt that, judged by the standards of the antitrust law, this merger would fail, at least as to Florida (App. A, *infra*, p. 24a). The court concluded, however, that approval of the merger was within the power of the Commission despite the court's misgivings as to the adequacy of the record and the judgments made by the Commission (App. A, *infra*, pp. 20a, 23a, 41a, and n. 30, 36). The Commission, the court concluded, had recognized the danger areas in the proposed merger and had made findings, in terms of the public interest, equal in most respects to those made in the motor carrier consolidation approved in *McLean Trucking Co.* v. *United States*, 321 U.S. 67.[6] The district court noted two distinctions

[6] The *McLean* case involved consolidation of seven motor carriers. The Commission's decision authorizing the consolidation is reported in *Associated Transport, Inc., Control and Consolidation*, 38 M.C.C. 137.

between the motor carrier consolidation involved in *McLean* and the railroad merger approved here: Entry in the motor carrier field is relatively easy, but virtually impossible in railroading; The motor carrier created by the consolidation in *McLean* would continue to have substantial motor carrier competitors, but the railroad created by the merger of Seaboard and Coast Line would have a rail monopoly at least in parts of the Southeast (App. A, *infra,* pp. 28a, 32a, 38a). Those distinctions, the district court concluded, were overcome by the "new policy" adopted by the Commission in this case for appraising anticompetitive effects of a proposed rail merger. This new policy, as the district court saw it, was to emphasize competition between the various modes of transport rather than competition among carriers of the same mode. In the court's opinion, the Commission has power to adopt such a policy (App. A, *infra,* pp. 41a-42a).

The district court characterized as "cogent" an argument that the dollar savings to the railroads resulting from a merger of two prosperous and financially healthy roads are insufficient to overbalance the anticompetitive effects of the merger. The court held, however, that the Interstate Commerce Act required the Commission to give primary emphasis to the public interest factors specified in section 5(2)(c) and not to antitrust law and policy (App. A, *infra,* pp. 36a-37a).

THE QUESTIONS ARE SUBSTANTIAL

This case presents important issues in the accommodation of antitrust policy with the merger provisions of the Interstate Commerce Act. Merger of Seaboard and Coast Line is one of twenty-one pend-

ing, major railroad mergers involving 75 percent of the nation's railroad assets. Disposition of these cases will vitally affect the future of transportation in every part of this country.

The issues presented in this case are important because the Commission adopted, and the lower court sustained, public interest standards effectively eliminating antitrust policy of preserving competition and preventing monopoly from rail merger proceedings. Antitrust policy has been effectively written out of railroad mergers by finding dollar savings, realized by eliminating facilities and employees necessary to conduct present competitive railroad services, to be the "foremost" public benefit justifying merger, without any finding that the dollar savings to the merged railroad are necessary for, or are related to the public interest in sustaining and improving transportation service. Under the Commission's view of the public interest, the elimination of competition in the railroad industry is, of itself, a public benefit since an arithmetic showing of savings can be made in any case involving the elimination of competing services. In fact, the more extensive and significant the competition to be eliminated, the greater the dollar savings and the greater the presumed public benefit to be achieved by merger.

We submit, further, that the National Transportation Policy condemns the Commission's reliance upon intermodal competition as an effective substitute for the present Seaboard-Coast Line competition without any findings respecting the extent to which the present Seaboard and Coast Line traffic is immune from intermodal competition because of the inherent advantages of rail transport.

These issues, as we shall point out, are now ripe for plenary review by this Court.

1. Commission approval of the proposed merger was predicated upon the substantial savings of $20 million the Commission estimated the merging railroads could realize from the elimination of duplicate facilities and functions (320 I.C.C. at 207).[7] At least half of these savings, it was acknowledged, would come from the elimination of 4,257 jobs and the relocation of 4,439 other employees (320 I.C.C. at 154, 157).

These savings were the essential basis for the Commission's conclusion that the public benefits accruing from the merger outweigh the anticompetitive consequences of the merger. If projected savings achieved from the elimination of facilities and employees essential to competing railroad operations are—of themselves—public benefits justifying the elimination of competition, antitrust law and policy has been effectively deleted from the standards to be applied by the Commission in considering railroad mergers. Accommodation of antitrust law and policy with the merger provisions of the Interstate Commerce Act and National Transportation Policy, as required by this Court's decisions in *McLean and Minneapolis,* compels at the very least findings demonstrating that these

[7] The Commission concluded that a total of $20,000,000 could be realized from the following: (1) Elimination of duplicating stations and terminals—$4,400,000 (320 I.C.C. at 158); (2) Abolition of 4,257 jobs and relocation of 4,439 employees—$10,200,000 (320 I.C.C. at 157); (3) Increase in freight revenues by diverting to the lines of the merged railroads, traffic which the Seaboard and Coast Line now handle in conjunction with other railroads—$4,900,000 (320 I.C.C. at 157); and (4) Elimination of duplicate repair facilities, and combining transfer facilities used for handling less-than-carload freight—$500,000 (320 I.C.C. at 157, 158).

savings are directly related to the realization of the objectives of the National Transportation Policy and which, in the absence of merger, can not be realized effectively. We think that the Commission's report wholly fails to demonstrate that the savings to the railroads—bought at the price of monopoly and elimination of existing rail competition—are related to any public benefit.

The report of the Commission, after reciting the anticipated savings, states that the savings should enable the merged company to meet effectively the increasing competition from other modes of transport, increase the financial stability of the merged company, bring about a reduction in the cost of rail service to the public, assure adequate future transportation service in the entire Southeastern States and permit a more coordinated economical, efficient, and expeditious service to the public (320 I.C.C. at 207). Financial stability and economic, efficient, and adequate service are, of course, objectives of transportation regulation under the National Transportation Policy. But the Commission's findings fail to establish the essential connection between savings to the merged railroads and these public interest objectives. For example, if dollar savings to the merging railroads are public benefits because they strengthen the financial stability of the merging companies, there must be some findings to establish that Seaboard and Coast Line are now unstable or, at the minimum, that additional financial strength will enable the merged company to carry out programs of improvement which they cannot achieve as individual railroads. But there are no findings to this effect in the Commission's report and none are possible. Seaboard and Coast Line, as individual rail-

roads, are prosperous railroads with ample resources to carry out any capital improvements necessary for adequate, safe, efficient, and economical service. The Commission notes in its report that Seaboard and Coast Line are currently in healthy financial conditions and past earnings records are impressive (320 I.C.C. at 146, 149). The Commission, observes that, the rates of return earned by Seaboard and Coast Line individually are above the average for the railroad industry, but are below that of other modes of transport and other industries (320 I.C.C. at 149). The Commission never discloses what, if any, significance this comparison may have for this case.[8] The

[8] The court, relying upon the Commission's characterization of the rates of return of Seaboard and Coast Line as not comparable with that earned by other industries and modes of transport, concluded that it *may* not be entirely accurate to refer to the Seaboard and Coast Line as financially healthy railroads. Rate of return, the court noted, *may* affect the ability of a railroad to obtain required capital funds from commercial sources at current interest rates. (App. A, infra, pp. 37a-38a)

This holding by the district court illustrates another vice of the Commission's report in this case. The Commission did not find that Seaboard and Coast Line have been unable to borrow at current interest rates from commercial sources when required, or that these railroads need additional funds that can not be supplied from their own surplus or reserve for capital improvements. Such findings could not be made on this record. Seaboard had in 1962 a capital surplus of $53.9 million and retained income of $151.3 million, while Coast Line had capital surplus of $9.5 million and retained income of $256.9 million (320 I.C.C. at 146-147)

This Court has repeatedly condemned imprecise administrative findings which leave important issues to conjecture and the *post hoc* rationalizations of the contending parties. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168; *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196-197; *Atchison T. & S. F. R. Co.* v. *United States*, 295 U.S. 193, 201-202. Judicial review in this important case should not depend on the proposition that "it may not be entirely accurate" to refer to the merging railroads as financially healthy.

fundamental differences in railroad financial structure as compared with other carriers and other industries are frequently thought to justify a difference in the rates of return.

The Commission concludes that the dollar savings will assure adequate future transportation in the Southeastern States. There are, however, no findings that adequate future transportation service by these railroads is in any danger in the absence of this merger. The Commission imposed no requirement that the dollar savings be used by Seaboard and Coastline for any specific purpose claimed to be related to an improvement in service. The Commission nowhere finds that Seaboard and Coast Line are not now able to compete with other forms of transport. The report demonstrates in fact that Seaboard and Coast Line have dramatically increased revenues and volume in the transportation of bulk commodities which constitute the basic rail traffic. In the end, the Commission is forced to attempt the essential connection between costs savings to the railroads by eliminating competitive facilities and the public by concluding that: ". . . it is axiomatic that the elimination of wasteful and unnecessary facilities and services will redound to the benefit of the public generally" (320 I.C.C. at 207).

We submit that the history of the regulation of railroads and the policy of the antitrust laws deny that savings realized by a railroad monopoly will redound to the benefit of the public. Accommodation of the antitrust laws with Interstate Commerce Act on such a basis effectively excludes preservation of railroad competition and prevention of monopoly from the concept of public interest. Competition obviously requires duplicate facilities. Antitrust policy assumes

that the public benefits to be realized from competition justify the costs of such duplication. The Commission has written that concept out of railroad mergers and the district court has sustained that result.[9] This ultimate issue of public interest under the Interstate Commerce Act should be resolved by this Court.

2. The district court concluded that the Commission had announced, in approving the merger of Seaboard and Coast Line, a new policy of reliance on intermodal competition rather than competition among railoads to promote the public interest. This policy and its application to this case was within the power of the Commission and was not arbitrary or capricious on this record, in the opinion of the district court (App. A, *infra*, pp. 41a-42a).

Whatever it may be labeled, the Commission's analysis of the anticompetive consequences of this merger is inadequate. The Commission's disregard of rail competition is not supported by the record and flatly contradicts the National Transportation Policy established by Congress.

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[9] The district court may have believed that this public interest issue had not been urged before the Commission, since the court noted that, if the argument were made before the Commission, it "would doubtless be given weight" (App. A, *infra*, p. 36a). The fact is that the argument was made repeatedly before the Commission. The Department of Justice in its initial brief to the Commission dated October 30, 1961, made the contention at page 2. The argument was reiterated and amplified in Justice's Exceptions to the examiner's report, dated December 7, 1962, at pp. 18-19, 101-103. East Coast took the same position in its Exceptions dated December 7, 1962, at pp. 69-71, and raised the issue in oral argument held May 7 and 8, 1963, before the entire Commission. See Transcript of Oral Argument, pp. 5541, 5551.

The Commission's treatment ignores the inherent advantages of railroads in terms of cost, service, and utility, not possessed by other modes of carriage. The district court in this case noted the limited extent to which Seaboard and Coast Line traffic in phosphate rock is subject to competion from trucks and water carriers (App. A, *infra*, pp. 19a-21a). The bulk of the traffic transported by Seaboard and Coast Line consists of commodities for which railroads possess distinct advantages over other forms of transport. Intermodal competition is not a substitute, from the standpoint of the public interest, for competition among railroad competitors each of which possess the same inherent advantages. The Commission has itself previously recognized this important principle. In *Santa Fe Trail Stages, Inc., Common Carrier Application*, 21 M.C.C. 725, 748-749 (1940), the Commission held:

> Regulated monopoly is not a complete substitute for competition. The latter fosters research and experimentation and induces refinements in service which are not likely otherwise to be accomplished. 'Nor is it enough to say that rail and air service and the private automobile provide all the stimulus required, as vigorously contended by protestants . . . Competition from within the field of one's endeavor is one thing; that from without is quite another. Those inclined to patronize a bus service, for instance, may find its inherent advantages sufficiently attractive to induce them to use such service as is offered without demanding more. Thus, competition from without is met by the inherent advantages of a possibly inferior service, and the operator thrives while the patrons are denied that ultimate in service and convenience which they have a right to expect and which would be fostered by direct competition from within the field of endeavor.

Adequate analysis of inherent railroad advantages is essential to a proper discharge of the complex and important responsibility of the Commission in these important rail merger proceedings. A policy that ignores the public interest in competition among railroads loads the scales in favor of merger. Moreover, freedom from effective competition, because of inherent cost and service advantages, destroys any basis for a presumption that cost savings to the railroads will inevitably redound to the benefit of the public.

CONCLUSION

This case presents important questions in the accommodation of antitrust policy and the Interstate Commerce Act provisions authorizing the Commission to approve railroad mergers. Probable jurisdiction should be noted.

Respectfully submitted,

A. ALVIS LAYNE
EUGENE M. MALKIN
948 Pennsylvania Building
Washington, D. C.
Attorneys for Appellant Florida East Coast Railway Company

FREDRICK H. KENT
Florida National Bank Building
Jacksonville, Florida
Of Counsel

October 1966

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-64-Civ. J.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, ET AL., *Plaintiffs,*

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants.*

Judgment

In accordance with the opinion of the court and the special concurrence this day filed, IT IS ORDERED, ADJUDGED and DECREED by the court that the injunction prayed for by the plaintiffs be denied and that judgment be entered in favor of the defendants.

The costs are taxed against the plaintiffs, except that no costs are taxed against the United States.

Done this the 8th day of June 1966.

RICHARD T. RIVES
Richard T. Rives
United States Circuit Judge.

BRYAN SIMPSON
Bryan Simpson
United States District Judge.

WILLIAM A. MCRAE, JR.
William A. McRae, Jr.
United States District Judge.

Opinion

Before RIVES, Circuit Judge, and SIMPSON and MCRAE, District Judges.

RIVES, Circuit Judge:

Our first opinion[1] in this case was vacated and remanded by the Supreme Court and we have now considered the Interstate Commerce Commission's action anew. The Interstate Commerce Commission,[2] by an order entered in December 1963, authorized the merger of the Atlantic Coast Line Railroad Company[3] with the Seaboard Air Line Railroad Company,[4] subject to certain routing and gateway conditions and employee protective conditions. Related acquisition of control by Seaboard of carriers subsidiary to or affiliated with Atlantic, most prominently including the Louisville and Nashville Railroad Company, was also authorized. 320 I.C.C. 122 (1963). Florida East Coast Railway Company[5] brought suit in this Court asking that the ICC's order be enjoined, annulled and set aside.

A three-judge district court was convened pursuant to 28 U.S.C.A. § 2325. The Attorney General, representing the United States, opposed the merger and therefore the United States was realigned as a party-plaintiff. The Railway Labor Executives' Association, the Southern Railway Company,[6] and its affiliated companies in the Southern Railway System intervened as parties-plaintiff. At the hearing on remand the City of Tampa also intervened

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[1] Florida East Coast Ry Co. v. United States, 242 F. Supp. 14, *rev.*, 382 U.S. 154 (1965).

[2] Hereafter Commission or ICC.

[3] Hereafter Atlantic or ACL.

[4] Hereafter Seaboard or SAL.

[5] Hereafter FEC.

[6] Hereafter Southern.

as a party-plaintiff. In addition to defendant ICC, the Mercantile-Safe Deposit and Trust Company, the Seaboard and the Atlantic, all intervened as parties-defendant. In this posture issue was joined.

After submission of briefs and full argument, in our first opinion we set aside the ICC's order and remanded the case to the Commission for further proceedings. Our reasoning was two-fold. First, we determined that the ICC's analysis of the merger was defective because it failed to apply proper product and geographic market criteria as explicated in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). Second, we held that the Commission erred in not specifically determining whether the merger violated section 7 of the Clayton Act, 15 U.S.C.A. § 18 (1964 ed.). The Supreme Court vacated our judgment and remanded "for a full review of the administrative order and findings pursuant to the standards" they had previously "enunciated." 382 U.S. 154 (1965).[7]

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[7] In explaining the proper scope of review, the Supreme Court said:

> "We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis*, at 186:
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> "'Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, McLean Trucking Co. v. United States, 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for. [acquisitions] by the standards of the antitrust laws." 321 U.S., at 85-86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy." 321 U.S., at 87.'" (382 U.S. at 156.)

This case presents a head-on collision between the antitrust laws and the Interstate Commerce Act. It is incumbent upon us to seek to rationalize the statutes involved here and make of them, to the extent that what Congress has written will permit, a harmonious functional body of law. Section 5(2) directs the Commission to approve voluntary rail mergers which it finds to be "consistent with the public interest," but reserves to the Commission power to approve the merger subject to such "terms and conditions" as it may find to be "just and reasonable." Section 5(2)(c) of the Interstate Commerce Act, which sets forth certain factors which must be considered by the ICC in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. However, since section 5(11) exempts carriers and individuals participating in an approved merger from the antitrust laws, the ICC has long been required to give weight to the antitrust policy of the Nation in approving mergers.[8] It

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[8] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) at 456; McLean Trucking Co. v. United States, 321 U.S. 67 (1944) at 79-80, 87. The Commission in the instant case clearly recognized this duty when it said (320 I.C.C. at 128-29, 206):

> "However, we may not disregard the policy underlying the antitrust laws even though carriers participating in a merger are relieved by section 5(11) from the operation of such laws. *Minneapolis & St. Louis R. Co.* v. *United States, supra* [361 U.S. 173]. Our primary task is to reconcile the objective of 'preventing injurious waste and in securing more efficient transportation service,' *New York Central Securities Corp.* v. *United States, supra,* [287 U.S. 12], at 26, with the general concern of Congress 'that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time.' *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 346 (1962). In short, our 'problem is one of accommodation of section 5(2) and the

is the accommodation of the national transportation policy with the national antitrust policy with which this litigation is chiefly concerned.

The records and briefs in this case read far more like an antitrust case or FTC review proceeding than like an action to set aside an order of the ICC. This aspect can only be indicative of one fact—at some point the orderly administrative process envisioned by Congress has been derailed. All too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the "public interest" as expressed in the Interstate Commerce Act. Review of ICC proceedings, while in many respects quite similar in appearance to FTC review, is substantially different.

It is not without significance that Congress placed review of proceedings of the FTC in the Courts of Appeals and those of the ICC in a three-judge district court. Each has three judges, but there the comparison ends. The FTC is to administer a group of statutes whose meaning and content are primarily entrusted to the judiciary for rational extrapolation. There was no intention on the part of Congress that the FTC should become a plenary body, reshaping American industry to a model which the Commission in its own wisdom decided best served the Nation. On the contrary, the FTC was to prevent "unfair competition" in widely divergent industries, preserving the

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antitrust legislation.' *Minneapolis & St. Louis R. Co.* v. *United States, supra,* at 186.

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"Although section 5 transactions are immunized from the operation of the antitrust laws, the policy reflected by such laws is nevertheless an important element in determining public interest. As we have stated, we are confronted here with the task of accommodating section 5 and the antitrust laws, and in so doing, we must reconcile the numerous conflicting considerations that are inevitably involved."

existing price system so fundamental to the American way of life.

Review of such proceedings could easily be fitted into the normal appellate process. A one-hour argument coupled with briefs sufficient to phrase out the issues with which courts of appeals routinely deal, allow a circuit court to give a carefully studied review.

The ICC stands in a uniquely different posture. Congress has vested the Commission with "exclusive and plenary" powers in the regulation of rail mergers. No one who reviews the history and language of the Interstate Commerce Acts can doubt that Congress has entrusted the ICC with plenary power to regulate almost every aspect of the rail industry and, for that matter, almost every aspect of the transportation industry save the airlines.[9] The ICC is in many ways a super-management, often making managerial-type decisions affecting the transporation industry, with but one overriding duty—to protect the public interest.[10] A rail carrier cannot change rates without ICC approval, and the ICC can on its own initiative investigate and alter rates after proper findings.[11]

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[9] 49 U.S.C.A. § 1, et seq.

[10] In United States v. Pierce Auto Lines, 327 U.S. 515 (1946) at 535-36, the Supreme Court said: "We think the court [below] misconceived * * * its own function. It is not true, as the opinion stated, that * * * 'the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted." See United States v. Trucking Co., 310 U.S. 344 (1940). This was the role in which the ICC saw itself cast in the instant case (320 I.C.C. at 206): "In fact, as guardian of the public interest, it is our responsibility to determine whether the proposed merger will, as required by the national transportation policy, contribute to the development and maintenance of a public transportation system which will meet the needs of our Nation's commerce and or national defense."

[11] 49 U.S.C.A. § 15.

New services cannot be provided nor old ones discontinued without Commission approval.[12] No new railroad may enter the field without ICC permission; the Commission may compel an existing railroad to extend its line and provide new service.[13] We have, in effect, a government-protected monopoly for those already providing service. In the area of rail mergers and consolidations, Congress' intention to let the ICC plan the structure of the national transportation industry has long been apparent.[14] World War I with the government take-over of the rail system had left this Nation's primary transportation system in a state of dilapidation. War needs had diverted critical materials to other areas of the economy and needed rail repairs had been neglected.

Congress, therefore, determined that the health and vitality of the Nation's railroads could best be restored by merging them into fewer, more efficient systems than then existed. Congress realized that it was functionally not the appropriate body to study and determine which railroads should be combined. It had neither the time nor the facilities. The Transportation Act of 1920 thus for the first time conferred upon the ICC "exclusive and plenary" power over rail mergers. The Commission was directed to "prepare and adopt a [master] plan for the consolidation of the railway properties of the continental United States into a limited number of systems.[15] However, the Commission was not given power to force consolidation. It had to come voluntarily. Only mergers which were in harmony with the master plan could be

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[12] 49 U.S.C.A. §§ 1, 13(a).

[13] 49 U.S.C.A. § 1.

[14] For a brief background note on the present section 5, see appendix to Justice Frankfurter's opinion in St. Joe Paper Co. v. Atlantic Coast Line Co., 347 U.S. 298 (1954), at 315.

[15] 41 Stat. 481.

approved. Approved mergers were exempt from the anti-trust laws.

It was apparent almost from the outset that the master plan approach had set an impossible pattern. The Transportation Act of 1940 took a more realistic view.[16] It abandoned the idea of a master plan, as such, and adopted a more flexible approach which authorized the ICC to approve carrier-initiated voluntary plans for mergers if those plans conformed to a public interest test prescribed by the Act. A requirement, relating to the preservation of competition contained in the 1920 Act was deleted by the 1940 Act. The initiative to formulate plans for consolidation or merger thus passed from the Commission to the rail carriers; but exclusive and plenary power to grant permission for such mergers subject to such conditions as might be preseribed was left with the ICC.[17]

Unlike review of FTC proceedings, review of ICC approved mergers involves the review of intricate, expert plenary judgments in a highly specialized area of our economy that has long been subject to direct precise regulation.[18] The ICC was authorized to make *ad hoc* deter-

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[16] 54 Stat. 905.

[17] While there were many who desired to give the Commission power to compel mergers, Congress declined the invitation to confer that power. St. Joe Paper Co. v. Atlantic Coast Line Co., 347 U.S. 298 (1954); Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 275 U.S. 216.

[18] In Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93, the Supreme Court stated:

> "Rate structures are not designed merely to favor the revenues of producers and carriers. The Commission has the consumer interest to safeguard as well. And when it undertakes to rationalize the interests of the three, great complexities are often encountered. The economics of the bituminous coal industry have baffled even experts. We would depart from our competence and our limited function in this field

minations within the interstices of individualized records. It is appropriate that initial review should be in a district court, where each case may be set for hearing individually with as much time as necessary allotted. This case is a good illustration. Our last hearings took a full day, and could not have been compressed into the short time usually provided for appellate arguments.

This Court must not shirk its duty by providing only a perfunctory review. But we are equally bound to keep our review within the limits intended by the statutory scheme of this particular agency.[19] We would be no friend of the administrative process if we were to leave the Commission at large, free to roam from one arbitrary or capricious act to another. If judicial review is to have a

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if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative ratemaker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field. See *Board of Trade* v. *United States*, 314 U.S. 534, 548; *New York* v. *United States*, 331 U.S. 284, 347-349."

See ICC v. Parker Motor Freight, 326 U.S. 60 (1945); American Trucking Association v. United States, 344 U.S. 298 (1952); Hudson & Manhattan R. Co. v. United States, 313 U.S. 98 (1941); Carolina Secenic Stages v. United States, 202 F. Supp. 919 (W.D. S.C. 1962); Penn. R. Co.—Merger—N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 505. In East Texas Lines v. Frozen Food Export, 351 U.S. 49 (1956), at 54, the Supreme Court said: "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity with the conditions in the industry which it regulates."

[19] See, for example, comment in dissenting opinion of Justice Frankfurter, Stark v. Wickard, 321 U.S. 288 (1944), at 311.

basis for functioning, the ICC must do more than announce its ultimate conclusions by way of unrationalized fiat.[20] The Commission must explain its reasoning in clear and precise terms. It must support its application of that reasoning to the instant case by substantial evidence in the record on which we must base our review.[21] It is for us to determine whether the ICC has correctly applied the proper standards, and thus exhibited that familiarity with the problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience.[22]

The plaintiffs, and particularly the United States through the Antitrust Division of the Justice Department, vigorously attack the standards applied by the ICC in

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[20] Florida v. United States, 282 U.S. 194 (1930), at 208, 211-12, 215; S.E.C. v. Chenery Corp., 318 U.S. 80 (1943); Cf. Brook v. NLRB, 348 U.S. 96 (1954); United States v. American Sheet Tin Plate Co., 301 U.S. 402 (1937); Morehouse v. United States, 194 F. Supp. 940 (D. Neb. 1961), *aff'd*, 368 U.S. 348; Ayrshire Corp. v. United States, 335 U.S. 573 (1949); Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 275 U.S. 216; Ace Lines, Inc. v. United States, 197 F. Supp. 591 (S.D. Iowa 1960); Southern Railway Co. v. United States, 167 F. Supp. 747 (M.D. Ga. 1958), at 753.

[21] See United States v. Pierce Auto Lines, 327 U.S. 515 (1946); Boston & M. R.R. v. United States, 208 F. Supp. 661 (D. Mass. 1962), *aff'd*, 371 U.S. 26; Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19 (E.D. Mich. 1963), *aff'd*, 275 U.S. 216; Atchison T. & S.F. Ry. v. United States, 244 F. Supp. 955 (N.D. Ill. 1965), *appeal pending*. Cf. Gray v. Macy, 239 F. Supp. 658 (D. Ore. 1965).

[22] See Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93; American Trucking Association v. United States, 344 U.S. 298 (1953), at 313-14; see also, United States v. Trucking Co., 310 U.S. 344 (1940); Hudson & M. R. Co. v. United States, 313 U.S. 98 (1941); Chicago S.S. & S.B. R.R. v. United States, 221 F. Supp. 106 (N.D. Ind. 1963); Stark v. Wickard, 312 U.S. 288 (1944), at 309-10; Nashua Motor Express, Inc. v. United States, 230 F. Supp. 646 (D. N.H. 1964).

this case. They argue that the ICC failed to properly assess the dangers of this merger, because it failed to apply or misapplied the teachings of modern sophisticated antitrust principles. To understand how national antitrust policy comes into play, it is well at this point for us to review the relationship of section 5(2)(c) and section 5(11) of the Interstate Commerce Act. In approving a rail merger or consolidation the ICC is required by section 5(2)(c) to

> "give weight to the following considerations, *among others:* (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." (Emphasis added.)

Any reference to antitrust policy must be read into the words "among others" by implication, since section 5(11) exempts participants in an approved merger:

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved * * * and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

There is and could be no dispute that, in determining whether a given merger is in the public interest, the Commission should take into account the national antitrust policy of the United States.[23] Mr. Justice Black, speaking for the Court in *Northern Pacific Railway Co.* v. *United*

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[23] See n. 8, *supra.*

States, 356 U.S. 1 (1958) at 4, clearly stated the essence of antitrust policy as follows:

> "The Sherman Act was designed to be a comprehensive charter of economic libetry aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The Congress in 1940 enacted the following "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced*

with a view to carrying out the above declaration of policy." (49 U.S.C.A. Historical note following table of contents.) (Emphasis added.)

The main thrust of plaintiffs' argument is that this merger eliminates substantial competition between Seaboard and Atlantic, and in some areas even creates an effective monopoly over the transportation of certain products. This it is argued violates not only the antitrust policy but also the transportation policy of the United States since it fails to "preserve the inherent advantages of each" mode of transportation. Proof of these allegations is sought in a resort to modern sophisticated antitrust principles.

On remand the plaintiffs deny any intention to force the ICC to decide whether a violation of section 7 of the Clayton Act or of the Sherman Act has taken place. But at the same time they argue that the Commission must apply modern sophisticated antitrust market analysis and point to cases like *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) and the concepts of market definition there expressed as examples of how the ICC should have analyzed this merger.[24] It seems pointless to say that the

[24] The Commission has recently rejected the plaintiffs' demand that it slavishly adhere to the *Brown Shoe* market analysis. Penn. R. Co.—Merger—N.Y. Central Ry. Co., 327 I.C.C. 475 (1966), at 509. In Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway Co., I.C.C. (1966), at , (F.D. No. 21478) ms. pp. 65-66, the Commission explained: "Since the *McLean* case [321 U.S. 67] requires an appraisal of adverse competitive effects following the merger, Justice and other opponents of the merger assert that it is appropriate, if not necessary, to determine the areas of effective competition through an analysis of the relevant geographic and product markets, as those terms are used in antitrust cases. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). The Supreme Court in *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, in reversing *Florida East Coast Ry. Co.* v. *United States*, 242 F. Supp. 14 (M.D.

Commission must employ market definition tools calculated to show whether an antitrust violation has taken place, and when it reaches the point where a conclusion may be properly drawn, it may then stop since it need not draw any conclusions. But this illogical mode of behavior would be the result of following both the plaintiffs' rationale and the Supreme Court's recent opinion in this case.

Much confusion would have been eliminated in this case had everyone agreed that market analysis has but one function—to help pinpoint the danger areas. This tool is not a qualitative tool. It tells where one may expect a monopoly or a substantial lessening of competition in a given line of commerce carried on in a given geographical area. It does not tell whether this is good or bad. For purposes of the antitrust policy, Congress through its statutes has told us at what point restraints and monopolies are bad. For the purpose of the national transportation policy, Congress has told us that not all re-

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Fla. 1965), clearly held that the Commission need not determine whether the proposed merger, absent Commission approval, would violate Section 7 of the Clayton Act, and that in appraising the competitive effects of a proposed rail merger the Commission need not apply yardsticks developed for the purposes of the antitrust laws. The market criteria of *Brown Shoe* can be applied here, if at all, only with great caution and substantial qualification." Later in the report it said (ms. p. 91): "In making the necessary accommodation, the Commission is not required to employ market analysis techniques such as those described in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); nor is the Commission required to determine whether, but for the presence of section 5(11), the proposed merger would violate the antitrust laws of the United States. These questions were recently settled in *Seaboard Airline R. Co.* v. *United States,* 382 U.S. 154 (1965), affirming the McLean case and extending its rationale to mergers alleged to be inconsistent with the policy of section 7 of the Clayton Act."

straints and monopolies which violate the antitrust laws are bad.[25] The ICC in its wisdom, and not this Court, is to

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[25] Compare the statement of the Commission in Penn. R. Co.—Merger—N.Y. Central Ry Co., 327 I.C.C. 475 (1966), at 505:

> "The major goals of the antitrust laws are to preserve the independent competitive status of individual firms and to curb the undue concentration of the American economy without any special regard for the effects of this policy in a particular industry. Cf. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 316-23 (1962); *United States* v. *ALCOA*, 377 U.S. 271, 279-80 (1964). By contrast, in the transportation industry which is subject to extensive economic regulation, the worth of competition and not merely its preservation must be considered within the regulatory scheme enacted by Congress. The very fact that Congress has seen fit to enter into the comprehensive regulation of transportation contradicts the notion that competition is favored without qualification. Federal legislation affecting railroads is one of many areas of economic activity in which serious inroads have been made on an original policy favoring competition. *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 92-93 (1952). It is only in a blunt, undiscriminating sense that we can speak of competition as an ultimate good. *Ibid*, 92."

The history of the relationship between the Central Pacific Railway Co. (hereafter C.P.R.) and the Southern Pacific [Railroad] Company (hereafter S.P.) is a case in point. In 1914 the United States instituted suit to enjoin the S.P. from controlling the C.P.R., because it violated the antitrust laws. In 1917 the district court dismissed the suit. On direct appeal, the Supreme Court held that the combination of the two railroads "fetters the free and normal flow of competition * * * tends to monopolization [of the affected rail traffic]." United States v. Southern Pacific Co., 259 U.S. 214 (1922), at 229. The Supreme Court went on to say (259 U.S. at 230-32): "We reach the conclusion that the stock ownership in the Central Pacific acquired by the Southern Pacific is violative of the Sherman Act with the principles settled by this court * * * [which] collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and

determine which are to be allowed and which are to be considered bad. Our task is at an end when we satisfy ourselves that the Commission has made adequate findings supported by substantial evidence, that it has perceived the danger areas, and judging by the statutory standards has concluded that the public interest is best served by allowing the merger.[26]

We had felt that there is value in applying rational economic concepts embodied in modern sophisticated antitrust principles. This was what we undertook to demonstrate in our first opinion. However, as Justice Frankfurter aptly stated in his dissent in *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961) at 129-30,

> "An order of the Commission cannot stand, it is true, if we cannot tell what has been decided or if it leaves unclear the basis for its conclusions. *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 510, 511. Findings are no doubt judicially more per-

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vital part thereof, when the effect of such acquisition is to suppress, or materially reduce the free and normal flow of competition in the channels of interstate trade." Following the remand of the *Southern Pacific* case, the C.P.R. and the S.P. applied for and received approval of their transaction by the ICC under section 5 of the Transportation Act of 1920. 76 I.C.C. 508 (1923). In United States v. Southern Pacific, 290 Fed. 443 (D. Utah 1923), the district court sustained the ICC's ruling and entered an order effectuating the transaction even though it found it to be in violation of the Sherman Act.

[26] American Trucking Ass'n, Inc. v. United States, 364 U.S. 1 (1960); East Texas Motor Freight Line v. Frozen Food Express, 351 U.S. 49 (1956); Ayrshire Corp. v. United States, 327 U.S. 515 (1946), at 535-36; Black Ball Freight Service v. United States, 223 F. Supp. 191 (D. Idaho 1963); Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600 (D. Del. 1962), *aff'd*, 372 U.S. 702; Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (D. N.H. 1964); Carolina Scenic Stages v. United States, 202 F. Supp. 919 (W.D. S.C. 1962); Ace Lines, Inc. v. United States, 197 F. Supp. 591 (S.D. Iowa 1960).

suasive the more felicitously they are formulated and the less they require extraction from a diffuse report. But the Commission is not under statutory duty to set forth its findings in serried array. It is the Court's duty to sustain the Commission's findings if, as here, there is no real difficulty in determining what was decided and on what grounds.

"It is not the Court's function to impose our standards of lucidity or elegance in exposition upon the Commission."

This proposition is one of the things that the Supreme Court told us when it vacated our first decision in this case. Therefore, while rational economic principles contained in antitrust cases may aid us in pinpointing the danger areas, we may not require the ICC to travel to its conclusions only by this route.[27]

One example of the use of rational economic criteria should suffice to demonstrate the problems engendered by by this case. *Brown Shoe* adopts these criteria (370 U.S. at 325-26):

[Product Market]

"*The outer boundaries* of a product market *are determined by the reasonable interchangeability of use or the cross-elasticity of demand* between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. [Citation omitted.] *The boundaries of such a submarket may be determined by* examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses,

[27] See United States v. Pierce Auto Lines, 327 U.S. 515 (1946), at 529, 523-33.

unique production facilities, distinct customers, distinct prices, *sensitivity to price changes,* and specialized vendors." (Emphasis added.)

The Court went on to define the Geographic Market (370 U.S. at 336):

> "The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. * * * The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant."

Part of the confusion in the present case is occasioned by the assumption that *Brown Shoe* brought something new to the analysis of antitrust problems, i.e., markets, submarkets, geographic area analysis originated with the approach adopted by *Brown Shoe.* This idea is erroneous. The exact same definitional approaches were long ago adopted to test Sherman Act violations. *United States* v. *Corn Products Refining Co.,* 234 Fed. 964 (S.D. N.Y. 1916), 975-977 (per J. Learned Hand), appeal dismissed by agreement, 249 U.S. 621 (1919) cited, *United States* v. *Aluminum Company of America,* 84 S. Ct. 1283 (1964), at 1286, n. 3. The only difference between the Sherman Act approach and the Clayton Act approach is the quantum of effect necessary before a violation is proved.

It is argued that the ICC's failure to utilize sophisticated antitrust market definition tools is evidence that it failed to properly assess the merger. This contention must be rejected. The ICC has never applied this approach formally, and yet, in spite of the fact that Judge Learned Hand used it as early as 1916, the Supreme Court has never considered this as evidence of the ICC's failure to properly consider a merger.

It may be helpful to apply this tool in the present case. Railroads have a decided economic advantage in carrying

long-haul, heavy bulk products, e.g., phosphate rock mined principally in the western portion of central Florida. In terms of antitrust analysis, we submit that this service is a separate product market and Florida is the proper geographic area.

Some illustrations should demonstrate the point. Let us assume that railroads can haul phosphate rock 50% more cheaply than the next alternative mode of transportation, trucks. This means that if a truck could haul rock at $1 per pound, railroads could carry it at 50 cents per pound. Physically both of these services are interchangeable. If both modes set the price of hauling at $1, there would be "cross-elasticity of demand" between both.

However, if the railroad companies were owned separately from the trucks and if no products were available to bring a higher return and if space were available, railroads would set their price below $1 but above 50 cents, thus taking the business away from the trucks. Railroads are a submarket of long-haul, heavy, bulk products.

If there were competition by two or more railroads for the bulk business, the price would be set somewhere between $1 and 50 cents, but at such a price as would allocate the business between the roads based on market conditions. If, however, a monopoly is created, the monopoly may set the price at any level between $1 and 50 cents that will maximize its return, because it experiences no competition until the price reaches $1. The monopoly price may in fact be lower than the competitive price, depending on whether a change in the cost of transportation will appreciably affect the ultimate cost of the end product and thus increase or decrease its consumption. Thus a monopolist may pass on cost savings to achieve higher profits where a competitor will take the cost savings as higher profits without passing them on. The record in the present case gives us no data on which to predict what action will

be taken by a railroad possessing a monopoly in the bulk-haul products market of central Florida.[28]

While railroads are able to take the long bulk-haul business from trucks, barges or water carriers enjoy a considerable cost advantage over railroads. Since shipment by barge takes longer than shipment by rail, the cheaper cost is somewhat offset. The record in this case does demonstrate that barges are not physically interchangeabel with railroads as a major competitive mode of phosphate transportation. Barges are not able to serve interior points on phosphate, nor are they able to serve facilities that have special equipment designed solely for loading or unloading rail shipments. See 313 I.C.C. 495 (1961) (railroads able to divert traffic from water carriers even at $1 higher rate than water transportation); 291 I.C.C. 689 (1954) (railroads able to divert traffic from water carriers even at 35 cents higher rate than water transportation). It is, we think, accurate to say that railroads enjoy a decided economic advantage over all other modes of transport on heavy, long, bulk-haul products in central and western Florida. Before we could assess the meaning of any such monopoly, we would have to know much more about the competition experienced by phosphate rock and its end-products. If there are readily ascertainable sub-

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[28] With reference to revenue from phosphate rock, the Commission said (320 I.C.C. at 153):

> "The competition faced by the railroads from other modes of transport in the Tampa area is most apparent with respect to the movement of phosphate rock. While the tonnage of phosphate rock rail shipments increased from 9.8 million tons in 1956 to 11 million tons in 1960, the revenue of the applicant railroads from phosphate rock was less in 1960 than in 1956 by approximately $1.1 million, or 4.5 per cent. This revenue decline is attributable in part to the fact that in 1960, the revenue per ton on phosphate rock was $2.21 as compared with $2.61 in 1956."

This, of course, may only indicate that railroads have priced themselves at a level where cross-elasticity of demand with other modes of carriage will take place.

stitutes, even a monopoly as to phosphate rock might have little meaning. Compare the discussion of bulk, heavy-loading and low-rate coal by rail in *Pennsylvania R. Co.—Merger—New York Cent. R. Co.*, 327 I.C.C. 475 (1966) at 516-517.

The purpose of this example is to demonstrate that the plaintiffs' briefs are correct when they analyze the market structure and conclude that the merger, if allowed, creates a monopoly in parts of Florida and that that monopoly can have significant effects. But that is all market analysis shows. A careful reading of the ICC decision shows that the ICC clearly recognized this fact. The Commission referred to phosphate rock as "esentially a commodity normally handled by rail." 320 I.C.C. at 151. Throughout its report, the ICC recognized that a "monopoly" would be created in parts of Florida. It went on to say: "There is no question that there will be a significant reduction in rail competition in Florida." 320 I.C.C. at 166.[29] There-

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[29] In explaining the objections to the examiner's report, the Commission observed (320 I.C.C. at 139):

> "Of these exceptions, many of which obviously overlap, the most important relate to the anti-competitive consequences of the merger upon the shipping public, communities, and competing railroads. Justice and others contend that the examiner failed to make appropriate findings with respect to the anti-competitive effects and monopolistic consequences of the merger in Florida and in the Southeastern States generally. Their main argument on this issue is that the merger would eliminate or substantially reduce competition and create a potential monopoly in the Southeastern States. * * * Justice emphasizes that the merged company would operate 81 percent of all the class I railway mileage in Florida and would control 54.52 percent of the total southern region class I railroad mileage."

And at 163, the Commission found: "In both the 6- and 8-State areas the merged company would have more than 54 percent of the total railroad mileage, while Southern, its nearest competitor, would have about 34 percent. In Florida the merged company would have approximately 81 percent of the railway mileage in the

fore, the ICC reached the same conclusion that the applica-

State." The Commission did go into more detail on Florida (320 I.C.C. at 164-66):

> "The record here shows that rail competition will exist at every major city with a population in excess of 200,000 except at Tampa. The situation at Tampa and in the central and western portions of Florida is unique in that those areas are served by no other railroads except Seaboard and Coast Line. It is to be observed that in much of Florida, Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly, or an oligopoly if East Coast is included. On the basis of data contained in the Official List of Open and Prepay Stations, 78 I.C.C. A-43, effective April 15, 1953, and considering only those points at which agents are maintained, Seaboard has been the only railroad serving approximately 60 points in Florida, whereas Coast Line has been the only railroad serving approximately 70 Florida points. Thus, the number of Florida points at which there has been no competition is about 4 times as great as the number of Florida points at which Seaboard and Coast Line have heretofore competed. In our opinion, the diminution of competition within the State of Florida that would result from the proposed merger is largly a matter of degree. At most, the rail monopoly that would result from the merger in portions of Florida would merely supplant the duopoly which has long existed there and from which there have been no appreciable adverse competitive effects upon communities or the shipping public.
>
> "Although the merged company would have a preponderance of the railway mileage in Florida, its lines would connect with other rail carriers in that State at the following points:

"East Coast	Benson Junction, West Palm Beach, Jacksonville, Lake Harbor, Marcy, Miami.
"GS&F (Southern subsidiary)	Jacksonville, Crawford, Hampton, Lake City, Jasper, Lake Butler, Palatka.
"L&N	Chattahoochee.
"Live Oak, Perry & Gulf (Southern subsidiary)	Live Oak, Perry, Slade.
"South Georgia (Southern subsidiary)	Perry, Greenville.
"Southern Railway	Jacksonville.

tion of *Brown Shoe* type analysis would have reached, even though the ICC did it in a practical, not a theoretical, manner. Once we accept the fact that the Commission saw this problem, we can set to one side the mechanics of antitrust law and look to the only real issue, the accommodation of the national antitrust policy with the national transportation policy.

As shown by the record, these railroads receive a substantial increment of their revenue from traffic originating in Florida. It is precisely on this traffic that the monopoly created by the merger will have its greatest impact.[30] The

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"To illustrate further the anticipated effect of the merger upon the public in Florida, at the hearings in Tampa, the area in which the concern of monopoly is most prevalent, 19 shippers testified in support of the merger and 47 others would also have testified in support of it had the examiner not invoked the cumulative evidence rule. By contrast, only four shippers in the area testified in opposition to the merger. In any event, the percentage of railway mileage which would be operated by the merged company in Florida or the 6- and 8-State areas involved does not, standing alone, provide a suitable criterion for determining the sufficiency of the rail competition that would remain after the merger."

The Commission again noted the effect in Florida (320 I.C.C. at 211): "Except in portions of Florida, the overall reduction in rail competition in the Southeastern States will be relatively moderate and inconsequential when viewed in the light of the alternative rail service that will be provided by competitors of the merged company at most of the major industrial centers in the effected area"

[30] As pointed out by the Southern Railway System at oral argument, nine bulk commodities handled by the merging railroads account for approximately 75-77% of their business. See dissent of Commissioner Webb, 320 I.C.C. 214, 230-32. The record does not show what portions of the merging companies' revenues or profits are generated by the carriage of long-haul bulk prodoucts originating in Central and Western Florida. Nor does the record show that effective competition for this type of carriage presently exists in Florida.

Commission appears to have assumed that the equivalent of a conspiracy to fix prices in Florida already exists. The Commission said (320 I.C.C. at 164-165): "It is to be observed that in much of Florida, Seaboard and Coast Line heretofore have had what might be described as an imperfect monopoly * * *. At most, the rail monopoly that would result from the merger in portions of Florida would merly supplant the duopoly which has long existed there * * *."

In *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), the State of Georgia invoked the original jurisdiction of the Supreme Court with a complaint against 20 railroads. Georgia alleged that the railroads had conspired together, through the use of rate bureaus, committees, conferences, associations, etc., to establish arbitrary and unreasonable rates to and from the State of Georgia. These conspiracies, it alleged, had eliminated substantially all rail competition. The Supreme Court held that Georgia could pursue its request for an injunction. What Georgia won in the Supreme Court, it promptly lost in Congress. The Reed-Bulwinkle Act explicitly exempts rate agreements and rate bureau accords approved by the ICC from the antitrust laws. 49 U.S.C.A. § 5b.

For our purposes, it is important to remember that the Reed-Bulwinkle Act preserves the potential of competition since individual railroad initiative is a legal requirement. If the instant merger is permitted, then that initiative will be irrevocably lost. Cf. *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904). (This case may be viewed as advancing the proposition that a merger to soldify a conspiracy is illegal under the antitrust laws.) This Court has absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida. But whether this merger violates the antitrust laws by eliminating competition or potential competition is not the question before us.

The relationship of section 5 of the Interstate Commerce Act and the antitrust laws has been commented on by the ICC, the district courts and the Supreme Court on a number of occasions. In *N. Y. Central Securities* v. *United States,* 287 U.S. 12 (1932), the Supreme Court dealt with the predecessor of the present act, the Transportation Act of 1920. The ICC authorized the New York Central Railroad Company to acquire control, by lease, of the railroad systems of the Cleveland, Cincinnati, Chicago & St. Louis Railway, and the Michigan Central Railroad Company. A minority stockholder of each sought to attack the ICC's order. The authority to acquire control was sought on the ground that it would facilitate revision of routes, and the physical improvements needed for new routes, and would make possible important economies in operation. The question presented was whether the control granted was in the "public interest," and whether that term was so vague as to make it an unconstitutional delegation. The Court said (287 U.S. at 24-25):

> "Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Division Case,* 261 U.S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery were created. The Court directed attention to various provisions having this effect, and to the cri-

> teria which the statute had established in referring to 'the transportation needs of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' Id. p. 189, note. See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Sante Fe Ry. Co.*, 270 U.S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. * * * *"

In view of the Supreme Court, "The public interest is served by economy and efficiency in operation." 287 U.S. 23.

In *N. Y. Central* the carriers' lines were parallel and the plaintiffs argued that the acquisition would thus eliminate competition between the carriers. The Court answered (287 U.S. at 25-26):

> "The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission. The Congress, which had power to impose prohibition in the regulation of interstate commerce, *Northern Securities Co.* v. *United States*, 193 U.S. 197, had equal power to foster that commerce by removing prohibitions and by permitting acquisition of control where that was found to be an aid in the accomplishment of the purposes in view in the enactment of Transportation Act, 1920. See *New York* v. *United States*, 257

U.S. 591, 601; *Colorado* v. *United States,* 271 U.S. 153, 165. Exercising this paramount power, the Congress expressly provided in subdivision (8) of § 5, which has direct reference to subdivision (2), that 'the carriers affected by any order made under the foregoing provisions of this section' are 'relieved from the operation of the "antitrust laws," ' and 'of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.' The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case."

The principal precedent and first case to deal with the scope of review in the context of modern antitrust law was *Associated Transport, Inc.,* 38 M.C.C. 137 (1942), injunction denied, *McLean Trucking Co.* v. *United States,* 48 F. Supp. 933 (S.D. N.Y. 1942), *aff'd,* 321 U.S. 67 (1944). The ICC authorized seven large motor carriers (originally Arrow Carrier was to be an eighth, but dropped out after the ICC approved the consolidation) to merge, forming the largest motor carrier in the United States and the only "end-to-end" motor carrier from New England to Florida.

In the course of three pages of generalized language, the ICC detailed the benefits which it believed would accrue from the merger (38 M.C.C. 143-146): 1. Consolidation would result in a higher load factor on vehicles with a concomitant reduction in the number of vehicles required for service. 2. Unified garage and testing facilities would lead to safer operation. 3. Vehicles could be shifted more readily from one end of the system to the other in order

to meet peak demands. 4. In some cities terminals could be consolidated; additional terminals could be established where before there was not enough traffic for any one of the companies to establish a terminal. 5. Relations with shippers and public regulatory bodies would be simplified. 6. Tracing of shipments and settlement of claims would be facilitated. 7. Economy would result by combining administration. The Commission concluded (38 M.C.C. 146):

> "We find: That the consolidation would result in improved transportation service, and that through movement of freight would be simplified and expedited, equipment would be more efficiently utilized, terminal facilities would be improved, the handling of shipments would be reduced, relations with shippers and public regulatory bodies would be simplified, and safe operation would be promoted."

In the present case the ICC considered the benefits more carefully than in *Associated,* but concluded that they were present, citing almost the same factors. The ICC found the following benefits: 1. Consolidation of stations and terminals. 2. Consolidation of switching facilities and elimination of yard engines and yard diesels. 3. Consolidation would result in higher load factor on freight trains between major terminals with a concomitant reduction in the number of trains required. 4. Economy would result by combining administration. 5. Unified repair shops would result in more economical and safer operation, including the reduction of stores facilities (320 I.C.C. 154-59). The Commission concluded (320 I.C.C. 160-61):

> "In addition to the specific benefits above discussed, many other benefits can reasonably be expected to result from the elimination of wasteful and duplicative facilities and an *overall* (sic) improvement in operations. These benefits can be grouped as follows. In the area of improved service, it can be anticipated that benefits will be derived from (1) more flexible

schedules and more direct routes; (2) the elimination of interchanges and delays in transit; and (3) the simplification of transit arrangements and greater flexibility in arranging stopoff points. Reduction in shipping costs can be anticipated from the elimination of wasteful and unneeded transport facilities, the substitution of single-line rates on certain commodities, and the elimination of certain switching charges. A more adequate car supply, the availability of more specialized equipment, and more efficient utilization of equipment should result. There also are a number of advantages in dealing with a single corporate entity such as convenience in the settlement of claims and the tracing of cars. Additionally, the merged company will make a significant contribution to the economic and industrial development of the Southeastern States through the promotion of new industrial sites, improvements in port terminal facilities, and in the stabilization of employment which will flow from greater financial stability of the merged company."

If it were only necessary that the Commission find what it perceived to be benefits "securing more efficient transportation service," our inquiry would be at an end. The ICC's decision is no more vague or speculative in the present case than it was in *Associated.*

One real difference between *Associated* and the instant case is in the facts surrounding the post-merger competitive picture. In their first brief, filed June 8, 1964, the United States cites *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904) and its progeny for the proposition that "elimination of competition between Seaboard and Coast Line" violates the antitrust laws and is so significant that it prevents the ICC from allowing a merger. Clearly, the Government is correct that the elimination of significant competition, as here, violates the antitrust laws. But *N.Y. Central Securities, supra,* 287 U.S. at 25, cites *Northern*

Securities to demonstrate that Congress had power to authorize the ICC to waive the antitrust laws and allow a combination that would eliminate significant competition between the parties.

Associated clearly authorizes the ICC to eliminate competition between the parties to the merger. In answering a contention by the Antitrust Division similar to that made in the present case, the ICC said (38 M.C.C. at 150):

> "Undoubtedly, *substantial competition exists between certain of the carriers involved, and consummation of the instant transactions would eliminate such competition.* However, such fact alone is not controlling. We are unable to agree with the argument of the Antitrust Division that it was the intention of Congress in enacting section 5 that we approve only such transactions as would not result in an 'unreasonable' restraint of competition within the meaning of the antitrust laws, *regardless of benefits that might result or the adequacy of remaining competition.*" (Emphasis added.)

The Commission stated its understanding of the test to be applied as follows (38 M.C.C. at 150-151):

> "In our opinion, the Congress intended to place wholly within our judgment the granting or denying of authority for these transactions under section 5. The specific reference to the antitrust laws only emphasizes the Congressional intent that we should be empowered to approve transactions which otherwise would be violative of the antitrust laws, if we are convinced that the public interest would thus be best served. Stated differently, section 5 authorizes us to permit unifications which would, except for such approval, result in restraining competition contrary to the antitrust laws, where the disadvantages of such restraint are overcome by other advantages in the public interest,

> such as direct betterment in the public service of the carriers or indirect betterment through stabilization of the industry. Determination of the larger question as to whether the proposed unification would be consistent with the public interest involves consideration not only of the competition that would be eliminated, but also of the competition that would remain, and the advantages which would result from the unification."

Therefore, the affirmance of these principles in operation by both the district court and the Supreme Court should put to rest the argument that the elimination of competition between the parties is in itself enough to prevent an ICC approved merger where sufficient outside competition remained.

Before reaching the crux of the matter, "the competition that would remain," one other issue must be dispatched. The Government argues that the present merger is different in that it involves two healthy, stable railroads and not a failing company. *Associated* involved not only seven healthy trucking companies, but probably seven of the most healthy trucking companies in the United States. The national transportation policy and the Commission have always looked at benefits going far beyond the saving of a failing company. By restricting their authority to such companies, we would allow them to approve only those mergers that do not violate the antitrust laws. So far no court has been willing to take such a position and the Supreme Court has rejected it specifically. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) at 85-86.

The major difference between the record in *Associated* and that in the instant case is the substantial competition that remained after the merger in *Associated.* The Commission divided the Eastern United States into three regions—New England, Middle Atlantic, and the South. The ICC then analyzed the remaining competition in each

of these regions in great detail. The Commission's analysis is subject to some criticism but it does show that substantial intramodal competition remained. The Commission concluded (38 M.C.C. at 159-160):

> "The foregoing clearly shows that, if the proposed transaction is consummated, there would remain ample competitive motorcarrier service throughout the territory involved. In addition, all of the principle points and many others are served by one or more rail carriers. Competition is also afforded by motor-vehicle contract carriers and by carloading and forwarding companies."

The ICC also recognized that trucking, unlike railroading, was an industry affording ease of entry. 38 M.C.C. at 161. It should be apparent that there are two important differences between *Associated* and the present case—ease of entry and remaining competition.

The district court in *McLean* refused to enjoin the ICC order approving the Associated merger, explaining the problem of accommodating the antitrust laws and the Interstate Commerce Act as follows (48 F. Supp. 933 (S.D. N.Y. 1942) at 936):

> "Considerable light will be thrown on this problem at once by noticing the plain fact that while the Antitrust Acts and the Interstate Commerce Act are designed to bring about the conduct of business for the common good the former are also penal and are aimed at the evils of monopolies as such which unreasonably restrain trade or business while the later, though it does not disregard such evils, is primarily concerned with creation and maintenance of adequate transportation service to the public."

The court went on to say (48 F. Supp. at 937):

> "What is needed for adequate service is a matter for the Commission to decide and it is likewise free

to decide what amount of competition is in furtherance of the public interest and what is not. It is not bound to preserve or foster competition to a degree that will not best serve the public interest from the standpoint of adequate public transportation service and whether competition as such is adequate or not must depend upon its effect in furtherance of the attainment of the ends Congress sought to accomplish under the Interstate Commerce Act administered by the Commission. * * * *

"* * * * We cannot review the weight of the evidence or the wisdom of the order."

In affirming the district court, the Supreme Court recognized that the merger would eliminate competition between the parties. *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1943) at 71.

The Supreme Court said (321 U.S. at 76):

"In passing upon a proposed consolidation the Commission is required to 'give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; * * * (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.' § 5(2)(c). The foregoing provisions supply the general statutory standards for guiding the Commission's judgment; *and within their broad limits, its authority is 'exclusive and plenary.'* § 5(11)."

In discussing the accommodations of the antitrust laws and the Interstate Commerce Act, the Court said (321 U.S. at 85):

"And in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility. It in terms relieved

participants in appropriate mergers from the requirements of those laws. § 5(11). In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—*an effective safeguard against the evils attending monopoly,* at which the Sherman Act is directed." (Emphasis added.)

Later the Court explained (321 U.S. at 86): "Congress recognized that the process of consolidating motor carriers would result in some diminution of competition *and might result in the creation of monopolies.*" (Emphasis added.) The Court says to "prevent the latter effect" the Commission was given "power to control such developments." One interpretation of this wording is that the Commission cannot allow monopolies to be formed. But the words are subject to a different explanation. The use of the word "effect" may mean the Commission's power to regulate monopoly power, not a prohibition of the creation of any monopolies. The Commission was given broad, plenary powers and was to look at mergers as a part of the "national" transportation problem. Thus, there could be local or limited monopolies so long as they were controlled and contributed to the attainment of the national transportation policy objectives. Therefore, a limited monopoly, such as the one in the present case, might be allowed.

The Commission is to weigh, "as an administrative matter," "the effect of the merger on competitors and on the general competitive situation in the industry." As the Supreme Court said (321 U.S. at 87):

> "Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to

> the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is consistent with the public interest.' [Cites omitted.] If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." (Emphasis added.)

In the instant case, the Commission looked at and weighed all the factors it had examined in *Associated*. It is this weighing of factors and not the result that the statute compels.[31] The ICC considered those areas in Florida where a monopoly would be created, including the size of the cities involved and their relative importance. If we say that the Commission may do this where competition remains but not where some monopoly areas are produced, we will create an anomolous situation. Section 1 of the Sherman Act makes combinations in restraint of trade unlawful. The transactions involved in *N.Y. Central Securities, supra,* and *Associated-McLean, supra,* by restraining trade would possibly violate Section 1, and on a proper finding, as there made, the Commission could waive this violation. Section 2 of the Sherman Act makes attempts to monopolize illegal. Therefore, to strike down the Commission's action in the instant case will, in effect, say it can waive Section 1 of the Sherman Act or the more stringent Clayton Act, but not Section 2 of the Sherman Act. Nothing in the legislation admits that interpretation. Compare the situation where the ICC grants the right to

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[31] Cf. Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93, quoted supra, n. 18.

extend rail service to newly-discovered phosphate deposits to one railroad but not to its competitor. *Atlantic Coast Line R.R.* v. *United States,* 243 F. Supp. 945 (E.D. Va. 1965).

At oral argument the government attempted to clarify its "failing company" proposition. Counsel explained that not all healthy competitors should be prevented from merging. It was explained that the government's position really was that where two healthy competitors are involved economies or "dollar savings and other alleged benefits, transportation, service, and such other things" should *never* be enough to overcome severe "elimination of competition," such as here involved. This argument is cogent, and if made before the Commission would doubtless be given weight.[32] It distinguishes the *Associated-McLean* case, *supra,* where substantial competition remained. But this argument cannot, as a matter of law, be used to re-write the statute.

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[32] Cf. the Commission's statement in Great Northern Pacific & Burlington Lines, Inc.—Merger—Great Northern Railway Co., I.C.C. (1966) at (F.D. No. 21478) ms. p. 90:

> "The second general observation we wish to make is that the financial strength of the applicants is not a bar to merger. Cf. Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Ry. Co.-Merger, 324 I.C.C. 1 (1964). Section 5(2) of the Act is not limited to transactions involving a union of the weak and the weak, the strong and the weak or the large and the small. On the other hand, the prosperous condition of the major applicants is a highly material fact. Where carriers are so impoverished that they are unable, individually, to constantly improve their transportation services and facilities, the public interest involved in a pooling of their resources is obviously stronger than in a case where, as here, the applicants are financially able to improve their plants and facilities in step with advances in rail technology."

See also the Commission's discussion I.C.C. at , ms. pp. 96-97.

Congress has directed the ICC to give primary weight to four factors. *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1943) at 76 (quoted *supra*, p. 24). To allow the government's argument to override those statutory standards even when the Commission has carefully applied them and found the merger justified would be, as the Supreme Court said in *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961) at 89-90, equivalent to loading the scales in favor of but one factor.

In the present case it may not be entirely accurate to refer to Seaboard and Atlantic as financially healthy railroads. The Commission found (320 I.C.C. at 149): "While the past earnings record of both Seaboard and Coast Line is impressive, their rate of return has not been significantly high. Although it is above the average norm for class I railroads, it does not compare favorably with returns on investments in other industries or in other modes of transport." The ability of railroads to earn a rate of return sufficiently high to enable them to obtain funds for needed facilities in the capital market is a subject to which Congress has specifically directed attention. Congress in 1958 passed legislation designed to make funds available to railroads by allowing the ICC to guarantee loans in the aggregate amount of 500 million dollars. 49 U.S.C.A. § 1231, et seq.[33]

In describing the significance of Congress' action, the courts have said (*Southern Railway Co.* v. *United States*, 167 F. Supp. (M.D. Ga. 1958) at 754): "The whole import of this legislation is that funds for the development of needed facilities for the railroads are not available at current interest rates or in the capital market from ordinary commercial sources." Given this background, we

[33] See 1958 U.S. Code Cong. & Admin. News, p. 3456, for the legislative history of the Transportation Act of 1958. The Commission has now guaranteed loans in the aggregate of about 225 million dollars.

must conclude that the ICC has broad discretion in determining how financially healthy railroads should be before their merger ceases to be in the public interest.

Minneapolis & St. Louis R. Co. v. *United States*, 361 U.S. 173 (1959) is of little help to the plaintiffs. That case did little more than repeat what was said in *McLean Trucking, supra.* In *Minneapolis*, the ICC had to choose between two possible mergers. The Supreme Court agreed that the ICC was correct in choosing the merger that maintained the greatest degree of competition. In the instant case there is no choice between equally advantageous mergers. If there is to be any "benefits" at all, competition must be reduced.

In our opinion, the ICC has clearly realized the danger zones in this merger and after analyzing the problem has chosen what it concludes to be more important public benefits.[34] The voluminous record amply supports its findings. The greatest problem that we have experienced is that none of the plaintiffs in this case chose to build a record before the Commission on which to support their contentions.

Before this Court the government has presented able arguments. Had these been made before the Commission and had the government availed itself of the opportunity to build a record showing the basic facts it claims could be shown, this record might be made to tell a different story.

The government intervened before the ICC on the grounds that this merger was inconsistent with the anti-

[34] "We have carefully evaluated the effects of the curtailment of competition that will result from the merger and when considered in connection with the advantages of the merger, including improved services, safer operations, and lower costs, we are convinced that the advantages of the merger far outweigh the potential disadvantages." 320 I.C.C. at 212.

trust policy of the United States. It was admitted at oral argument that out of 35 hearing days, the government managed to be represented only on 5 days. The government asked for an opportunity to have a special hearing at which it desired to produce evidence to support its contentions. The Commission granted that request and set a hearing in Washington, D. C. The government then decided not to present any evidence.

In reaching the conclusion that this merger was in the public interest, the ICC reviewed at some length the competitive growth of other modes of transportation and their impact on the rail industry. The Commission voiced the railroads' contentions as follows (320 I.C.C. at 151):

> "* * * the applicants emphasized that the railroads have not participated proportionately in the country's economic growth, and that competition from other modes of transport contribute to a large extent to the financial problems now plaguing the railroad industry."

The ICC went on to announce its policy on intermodal competition in the following terms (320 I.C.C. at 166-167):

> "While we recognize in general the desirability of preserving intramodal rail competition, it is no longer the all-important factor that it once was in the days when the railroads had a virtual monopoly in all intercity freight traffic. With the development of intense competition in recent years from other modes of transport, the preservation of intramodal rail competition has lost much of its significance in the furtherance of the overall national transportation policy. Even after the merger herein is approved, effective competition among railroads will continue in most of the major industrial centers. * * *
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> "In other regulated industries, typically gas, electric, and telephone utilities, a single company frequently serves large metropolitan areas and often even sig-

nificantly larger geographic or market areas. As public utilities are affected with a public interest and are essentially monopolistic by nature, they are subjected to strict regulation and supervision by State and Federal regulatory agencies. Under regulation, their services, as a general rule, are efficient and reasonably priced despite the absence of competition. While exact comparability does not exist between railroads and public utilities generally, it must be recognized that railroads are subject to equally stringent regulation. Moreover, as railroads have the basic economic characteristics of public utilities and are subject to regulation in the public interest at both the Federal and State levels, it is not realistic to insist that intramodal rail competition must be preserved at all places, at all times, and under all circumstances. For these reasons and weighing all the factors previously discussed, plus the further consideration that railroads today encounter increasingly strong competition from other modes of transportation, we conclude and specifically find that (1) the reduction of rail competition caused by the proposed merger will not be substantial; (2) ample competitive rail service will remain after the merger throughout most of the affected area, and (3) such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities."

Thus, the ICC in an attempt to insure "adequate transportation service to the public" has focused on that phase of the transportation problem President Kennedy emphasized in his transportation message to Congress—*intermodal* competition.[35] The Commission reasoned that to

[35] 1962 U.S. Code Cong. & Admin. News, p. 4148, 108 Cong. Rec. 5509 (H. Doc. No. 384), Message of April 8, 1962; see also House Rep. No. 1922, 1958 U.S. Code Cong. & Admin. News, p. 3456, 3469-3471; 1955 Weeks Committe Report (Presidential Advisory Committee on Transport Policy and Organization).

maintain healthy railroads in the long run, it must foster competition at that level where it will have its most decisive effect. It reasoned that it could waive the antitrust laws where they prevent a rational transportation policy, and here it did waive those laws. The Commission took the position that the greatest good came from increasing competition in the Southeast as opposed to maintaining it in but a part of Florida. The plaintiffs object to these policy determinations because in their view they allow the Commission to resort to a broader statistical universe that minimizes the anticompetitive impact.

Of course, if judicial review is to have any meaning, extension of principles to meet new situations, such as the new policy on intermodal competition announced here, must be based on some minimum demonstration to the courts that the Commission has relied on relevant criteria to conclude that the new policy is in the public interest. Such a demonstration was made here. The Commission reviewed the impact of other modes of transportation on railroads. The ICC looked at the long-run needs of the different areas of the South to determine which was most important. We cannot say that based on this record a reasonable man could not reach the same conclusion which the Commission has reached.[36] Nor can we say its policy is inconsistent with the scheme of the regulatory statute. In short, nothing in the record before us indicates that

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[36] It is not our function to decide whether the Commission's conclusions as applied in this case were wise. It may be that more, not less, intramodal competition was needed in Florida. We are not at all certain that the government, had it availed itself of the opportunity provided, could not have shown how ineffective intermodal competition is in Florida. But the Commission went so far as to conclude that a monopoly in Florida was not too high a price to pay for increased intra and inter-modal competition in the southeastern part of our Nation where improved transportation is needed. This was not an unreasonable conculsion for one to reach after reading the record in this case.

the action taken by the Commission in accommodating the antitrust laws and the Interstate Commerce Act is arbitrary or capricious. That we may not have reached the same conclusion does not make the ICC wrong.[37]

Plaintiff, Florida East Coast Railway, attacked the protective provisions announced by the ICC to shield this plaintiff from the effects of the merger. Businessmen, like government agencies, talk about business in the flowing terms that generals reserve for their favorite war maneuvers. As a Nation, we find ourselves today involved in a "war in Viet Nam," a "war on poverty," a "war on ignorance," et cetera. The ICC is no exception to this masculine jargonic function. In speaking of East Coast's ability to survive any agressive tendencies of the newly-merged railroad, the Commission spoke of its "potentially strong counteroffensive weapon."

At oral argument the FEC bitterly attacked the use of such language, asserting it was devoid of any real substance and so were the protective provisions. The retaliatory language used by the Commission is expressive and to that end acceptable. In short, Southern and the FEC

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[37] See Ayrshire Corp. v. United States, 335 U.S. 573 (1949), at 592-93; United States v. Louisville & Nashville R. Co., 235 U.S. 314 (1914); Gray v. Macy, 239 F. Supp. 658 (D. Ore. 1965); Consolidated Freightways v. United States, 83 F. Supp. 811 (E.D. Wash. 1949); Assigned Car Cases, 274 U.S. 564 (1927); United States v. Trucking Co., 310 U.S. 353 (1940), at 352-54; United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946); United States v. New River Co., 265 U.S. 533 (1924); Black Ball Freight Service v. United States, 223 F. Supp. 191 (D. Idaho 1963); Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (N. N.J. 1964); National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (D. D.C. 1965); Willey v. United States, 245 F. Supp. 669 (E.D. Ill. 1965); Legge v. United States, 244 F. Supp. 878 (W.D. Pa. 1965); Florida East Coast Ry. Co. v. United States (I), 242 F. Supp. 14, *rev. on other grounds*, 382 U.S. 154 (1965); Atlantic Coast Line R. Co. v. United States, 243 F. Supp. 945 (E.D. Va. 1965).

would have us substitute our ability to predict future effects for that of the Commission. The ICC is far more experienced in this area than any one given court. The Commission, and not we, must tailor the protection to fit its expert prediction of the future. On this record, we are in no position to say that its careful study has led to capricious results. When not plainly unreasonable, we must leave to the agency vested with congressionally assumed expertise this type of decision.[38] The question boils down to whether the ICC acted wisely in not providing more protection. Statutorily we are not the all-wise of this field, and, while our crystal ball might indicate a different result than that of the Commission,[39] the record in this case supports its action.

The Commission determined that subsequent to the merger Mercantile-Safe Deposit and Trust Company[40] would have "power to control the merged company." 320 I.C.C. at 197. In reaching this ultimate conclusion the Commission detailed the relationship between Merchantile, Coast Line Company, the Louisville & Nashville Railroad, and the merging carriers. 320 I.C.C. at 142, 193-97.

By a combination of direct and indirect stock control, Mercantile will have control over the largest single block

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[38] See n. 37, *supra*.

[39] The Commission concluded (320 I.C.C. at 188):

"It is important to note that the conditions we have devised represent neither mere acceptance of the minimum concessions offered by the applicants nor full acquiescence in the demands of the intervening railroads, but rather are the product of our exhaustive study of the competitive situation in the Southeast. We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."

[40] Hereafter Mercantile.

of stock in the merged company. The Commission's primary factual findings are supported by substantial evidence in this record. Its ultimate conclusion that control will result is a reasonable one, well within the province of its statutory power.

The Commission also concluded that (320 I.C.C. at 197):

> "Merchantile is an investment company engaged exclusively in the banking and trust business. Its direct interest in the merged company is merely incidental to its primary business of managing trusts and estates."

Section 5(3) permits the ICC "to the extent" it deems appropriate to designate a person who is not actually a carrier as a carrier for the purpose of the Interstate Commerce Act, if such person is authorized to acquire control of an actual carrier in a transaction approved under section 5(2). Under section 5(3) it is clear that the ICC need not designate every person obtaining such control as a carrier. *United States* v. *Marshall Transport Co.*, 322 U.S. 31, 41; *Wellsville A.&G. Corp., Purchase and Control*, 295 I.C.C. 115, 129.

Under the "circumstances" of the instant case, the Commission decided not to exercise its section 5(3) power. The Commission's primary factual findings as to the character of Merchantile's activities are supported by substantial evidence in this record. We see no abuse of discretion in the Commission's ultimate conclusion based on those primary facts.

The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but in the long run the merger will provide greater job security and more stabilized conditions of employment for employees of the merged company. See 320 I.C.C. at 200. Approximately 4,257 jobs will be abolished and the location of employment will be changed

for 4,439 other employees. 320 I.C.C. at 154. One of the four primary criteria to which section 5(2)(c) directs the ICC's examination is "the interest of the carrier employees affected" by the merger.

In our first opinion, since we remanded the case to the ICC for further proceedings, we did not find it appropriate to reach the question of employee protection. The policy adopted by Congress clearly contemplated that the accomplishment of economies and improved transportation through consolidation of the Nation's rail carriers will have an impact upon rail employees. In section 5(2)(f), Congress provided for the protection of employees by the Commission. No merger may be approved that does not provide for "a fair and equitable arrangement to protect the interests of the railroad employees affected." Moreover, Congress provided that the Commission must insure "that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers • • • being in a worse position with respect to their employment."

The intervening plaintiff, Railway Labor Executives' Association,[41] bitterly attacks as inadequate the protective conditions adopted by the ICC. In the instant case the Commission adopted the protective conditions it announced in *Southern Railway Co.-Control-Central of Georgia Ry. Co.*, 317 I.C.C. 557, 729, 320 I.C.C. 377. The Association paints a sorry picture of confusion and utter chaos which it claims shrouds the *Southern Railway* conditions.

The Association points out that the *Southern Railway* conditions were imposed in a "control" case and argues that they cannot rationally be applied in a consolidation case. This contention is without merit. The problem created by acquisition of control or merger from the standpoint of affected employees is identical. This fact is

[41] Hereafter Association.

amply demonstrated by the expected problem discussed by the district court which reviewed the *Southern Railway* conditions. That court commented (*Railway Labor Executives Ass'n* v. *United States*, 226 F. Supp. 521 (E.D. Va. 1964) at 522, vacated on other ground, 379 U.S. 199 (1964)):

> "The Commission, in approving the transaction, was fully advised of the proposed consolidation of Central's freight agencies, yards, shops and accounting department into those of Southern, together with the resultant job losses entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions for the protection of the employees thus affected, which it determined more than met the statutory requirements of Section 5(a)(f) and would be fair and equitable."

The major argument of the Association is that the *Southern Railway* conditions are confusing and inadequate. The *Southern Railway* conditions codify the labor conditions previously employed by the Commission and are intended to provide a shorthand means of referring to those conditions when cited in cases such as the present merger. The basic employee protection conditions may be traced to the ICC's 1941 decision in *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285. That decision set forth conditions to protect affected employees who were displaced or dismissed during the four-year period following the effective date of the Commission's order.

In *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (1944) at 199-201, the ICC refined the protection contained in the *Texas & P.* conditions. Employees receiving the *Oklahoma* conditions were, in addition to the *Texas & P.* conditions, allowed moving expenses and losses on the sale of homes. The *Southern Railway* conditions in

Article I carry forward the *Oklahoma* conditions as the Commission's basic four-year protective provisions.

In the *New Orleans Union Passenger Terminal* case, 282 I.C.C. 271 (1952), the Commission went a step further and extended financial compensation beyond the four-year period provided in the *Oklahoma* conditions. These protections are carried forward in Article II of the *Southern Railway* conditioons. Thus, employees who are first affected during the first five years [42] after the effective date of the Commission's order are protoected until they obtain the full benefits of what is called the Washington Agreement. [43] Moreover, the *Southern Railway* conditions provide a stronger arbitration provision than did earlier provisions.

The Association seems to place a strained interpretation on the Commission's action. After reading the ICC's decision in this case and reviewing the background of the *Southern Railway* conditions, we do not think the Association's interpretation should prevail. Nor do we think there is merit in the argument that the Association never

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[42] This was conceded by the ICC's General Counsel at oral argument when he said: "In other words, we say that the employees first affected in the fifth year after the effective date of the Commission's Order get the same Washington agreement protection that they would have obtained under the New Orleans conditions. Nothing has been taken away from such an employee." (R. p. 143.)

[43] The "Washington Agreement," or the "Agreement of May 1936, Washington, D. C.," as it is sometimes called, is an agreement that was entered into by virtually all the railroads and railroad unions in the United States. This collective bargaining agreement provides some protection to employees affected by "coordinations" of facilities between two or more carriers. The Supreme Court ordered the Commission to clarify the relationship of the Southern Railway Conditions and the Washington Agreement in Railway Labor Executives' Association v. United States, 379 U.S. 199 (1964).

had an opportunity to argue against the *Southern Railway* conditions.

The Association had ample opportunity to argue for conditions it thought appropriate, and did in fact argue for an attrition clause. We must realize that the Commission's citation of the *Southern Railway* conditions is just a shorthand method of saying that, after consideration of all arguments, it applies the same conditions here as in *Southern*.

Some confusion may be engendered by the fact that the Virginia court [44] construed the *Southern Railway* conditions more narrowly than the Commission later said it had intended. The Commission has now abandoned any contention that it only went as far as the Virginia court thought, and we should not be confused by that interchange of occurrences. Read carefully and applied rationally, the use of the *Southern Railway* conditions in this case need cause no confusion.

After carefully examining the contentions of *Railway Labor Executives' Ass'n*, the Commission concluded (320 I.C.C. at 201):

> "We are unable to conclude that conditions requiring the retention of unnecessary employees in unnecessary positions [or the equivalent alternatives suggested by the Association] would be consistent with the public interest or sound business policy. The imposition of such conditions would unduly restrict carriers in the establishment of more economical operations, and would be in conflict with the objectives of the national transportation policy."

Based on the record in this case, we cannot say that the Commission's action has created inequitable or unfair labor

[44] Railway Labor Executives' Ass'n v. United States, 226 F. Supp. 521 (E.D. Va. 1964), *vacated in part*, 379 U.S. 199 (1964).

conditions. What was said in *Brotherhood of Maint. of Way Employees* v. *United States*, 221 F. Supp. 19 (E.D. Mich. 1963) at 29, *aff'd*, 375 U.S. 216 (1963), is applicable here:

> "It is recognized that even though there will be some immediate hurt to railroad employees in the approval of mergers and affiliations, railroad employees, as well as all other members of the public, will, in the long run, find more and better opportunities if the country's total economic health is protected. We cannot say that the conditions imposed by the Commission do not adequately protect the rights of the employees in this situation."

The Association also argues that the ICC misconstrued its statutory authority in one important respect. As the Association reads the words "employees of the carrier or carriers by railroad affected," the statute requires the Commission to protect not only the employees of the merging roads but also the employees of their competitors who may be affected.

The Commission has consistently construed this language as only requiring protection for the employees of carriers involved or participating in the transaction. This consistent practice lends weight to what seems the logical interpretation of the statute. Taken in context, the provision is but one of many dealing with the Commission's treatment of merger applicants. When Congress spoke of "carriers" in section 5(2), it referred to the participants. For example, in section 5(2)(a)(i) the statute required ICC approval for "two or more carriers to consolidate or merge." In section 5(2)(c) the statute speaks of the "interest of the carrier employees affected," obviously meaning participating carrier. And when Congress wished to refer to nonparticipating carriers in 5(2)(d), it said "another railroad or other railroads."

Taken in context, we think it clear that the "carrier or carriers" referred to in section 5(2)(f) are the carriers involved in the merger and most immediately affected by the Commission's action. We, therefore, hold that the statutory protection requirement is restricted to the carriers involved in the transaction.

We conclude that in formulating employee protection the Commission has not transcended its statutory bounds. Based on the record in this case, we also conclude that the Commission in approving this merger has not failed to "give weight to" "the interests of the carrier employees."

After considering the arguments which we have discussed and all other arguments in this case, we conclude that the ICC explained its reasoning and supported its application of that reasoning by substantial evidence. Since the ICC correctly applied the proper standards and thus exhibited that familiarity with the complex problems in the transportation industry which Congress anticipated the ICC would achieve from its particularized experience, we must and do sustain its order. The injunction prayed for is therefore denied.

Judge Simpson concurs in the result.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

SEABOARD AIR LINE R. CO.

v.

UNITED STATES;

and

INTERSTATE COMMERCE COMMISSION

v.

FLORIDA EAST COAST RAILWAY CO.

Appeals from the United States District Court for The Middle District of Florida.

Nos. 425 and 555 Decided November 22, 1965

PER CURIAM.

Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company filed with the Interstate Commerce Commission an application for authority to merge. In the administrative proceedings, the applicants contended that the merger would enable them to lower operating costs, improve service, and eliminate duplicate facilities; other carriers opposed the merger on the ground that it would have adverse competitive effects; and the Department of Justice contended that the merger would create a rail monopoly in central and western Florida.

The Commission approved the merger, subject to routing and gateway conditions to protect competing railroads. It recognized that the merger would eliminate competition and create a rail monopoly in parts of Florida. But it found that the merged lines carried only a small part of the total traffic in the area involved; that ample rail competition would remain therein; and that the reduction in competition would "have no appreciably

injurious effect upon shippers and communities." In addition, the Commission noted that the need to preserve intramodal rail competition had diminished, due to the fact that railroads were increasingly losing traffic to truck, water, and other modes of competition.

The three-judge District Court set aside the order and remanded the case to the Commission for further proceedings. It concluded that the Commission's analysis of the competitive effects of the merger was fatally defective because the Commission had not determined whether the merger violated § 7 of the Clayton Act by reference to the relevant product and geographic markets. By thus disposing of the case, the District Court did not reach the ultimate question whether the merger would be consistent with the public interest despite the foreseeable injury to competition.*

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U. S. 67 (1945), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis* at 186:

> "Although § 5(11) does not authorize the Commission to 'ignore' the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be 'little doubt that the Commission is not to measure proposals for [acquisitions] by the standard of the antitrust laws.' 321 U.S., at 85-86. The problem is one of accommodation of § 5 (2) and the antitrust legislation. The Commission remains obligated to 'estimate the scope and appraise the effects of the curtailment of competition which will result from

* It expressly declined to consider two further issues, *i.e.*, whether the Commission's labor protection conditions were adequate and whether control of the merged company by the Mercantile-Safe Deposit and Trust Company would be consistent with the public interest.

> the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquistion] will assist in effectuating the overall transportation policy.' " 321 U.S., at 87

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be "consistent with the public interest." 54 Stat. 908, 49 U.S.C. § 5 (2)(b) (1964 ed.).

Whether the Commission has confined itself within the statutory limits upon its discretion and has based its findings on substantial evidence are questions for the trial court in the first instance, *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952), and we indicate no opinion on the same. We therefore vacate the judgment of the District Court and remand the case to it for a full review of the administrative order and findings pursuant to the standards enunciated by this Court.

Vacated and remanded.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 64-64-Civ. J.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation, Florida East Coast Building, St. Augustine, Florida,
PLAINTIFF

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

(Filed May 13, 1965, Jacksonville, Fla.)

Before RIVES, *Circuit Judge*, and SIMPSON and MCRAE, *District Judges*.

Opinion

RIVES, *Circuit Judge:*

This is an action to enjoin, annul, and set aside orders of the Interstate Commerce Commission[1] which, subject to routing and gateway conditions and employee protective conditions, authorize the merger of the Atlantic Coast Line Railroad Company into Seaboard Aid Line Railroad Company and the related acquisition of control by Seaboard of carriers subsidiary to or affiliated with Atlantic Coast Line, most prominently including Louisville and Nashville Railroad Company. Florida East Coast Railway Company brought the action against the United States and the Interstate Commerce Commission.[2] Since the Attorney General, representing the United States,[3] opposes the merger, the United States has been realigned as a party plaintiff.

[1] See 49 U.S.C. § 17(9); 28 U.S.C. § 2321.

[2] See 28 U.S.C. §§ 2322, 2323; 49 U.S.C. § 17(9).

[3] See 28 U.S.C. § 2323.

Jurisdiction of this court is provided by 28 U.S.C. § 1336, and a district court of three judges has been convened as required by 28 U.S.C. § 2325.

Plaintiff Florida East Coast Railway Company, a Florida corporation, has its principal office at Saint Augustine, Saint Johns County, Florida, which is in the Middle District of Florida. Hence venue is properly laid in the Middle District. See 28 U.S.C. § 1398.

The Railway Labor Executives' Association, the Southern Railway Company, and its affiliated companies in the Southern Railway System intervened as parties plaintiff. The Mercantile-Safe Deposit and Trust Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company and The Atlantic Coast Line Company intervened as parties defendant in support of the challenged orders of the Commission.

Florida East Coast's motion for an order restraining temporarily the operation and effective date of the orders of the Interstate Commerce Commission, pending the final hearing and determination of the action, see 28 U.S.C. § 2324, was granted by the Honorable Bryan Simpson, Chief Judge, United States District Court for the Middle District of Florida, based on the specific finding that irreparable damage would result to the plaintiffs if the temporary restraining order was not granted. See 28 U.S.C. §§ 2284(3), 2325.

The Commission stated that the merger it approves[4] would result in the elimination of present competition between Seaboard and Atlantic Coast Line in a six-state area.[5] In the six-state area and in an eight-state area,[6]

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[4] Commissioner Webb, with whom Commissioner Tucker joined, dissented.

[5] The six states are Alabama, Florida, Georgia, North Carolina, South Carolina and Virginia.

[6] The additional states are Tennessee and Kentucky.

the merged company would control more than 54 per cent of the total railroad mileage, while the Southern Railway Company, its nearest competitor, would have about 34 per cent. The merged company would have approximately 81 per cent of the railway mileage in Florida. See *Seaboard Air Line R.R.*, 320 I.C.C. 122, 163 (1963). Approximately 4,257 jobs would be abolished and the location of employment would be changed for 4,439 other employees, 320 I.C.C. at 154. The Commission found that: the reduction of rail competition caused by the proposed merger will not be substantial; ample competitive rail service will remain after the merger throughout most of the affected area; and the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities. 320 I.C.C. at 167. The Commission noted that the merger will have substantial adverse effects upon many railroad employees and their families, but, in the long run, the merger would provide greater job security and more stabilized conditions of employment for employees of the merged company. See 320 I.C.C. at 200. Both Seaboard Air Line and Atlantic Coast Line are currently in healthy financial condition.

The questions raised in this three-judge district court action deal with the protective conditions for employees and with the relationship between section 5(2)[7] of the Interstate Commerce Act—which authorizes the Commission to approve proposed mergers that are found to be in the "public interest"[8]—and the antitrust laws, more specifically section 7 of the Clayton Act.[9]

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[7] 49 U.S.C. § 5(2).

[8] 49 U.S.C. § 5(2)(b); see *e.g.*, Phillips, Railroad Mergers: Competition, Monopoly, and Antitrust, 19 Wash. & Lee L. Rev. 1, 9 (1962).

[9] 15 U.S.C. § 18.

Plaintiff Florida East Coast suggests that the ultimate importance of this case is that the Commission has written preservation of competition and prevention of monopoly out of the concept of "public interest."

Section 5(2)(c) of the Interstate Commerce Act, which sets forth the certain factors which must be considered by the Commission in passing upon any proposed railroad merger or affiliation, does not expressly require that the Commission consider the antitrust laws as a factor in the public interest. The Commission is required by section 5(2)(c) to

> "give weight to the following considerations, *among others:* (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." [10]

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[10] 49 U.S.C. § 5(2)(c). (Emphasis added.) The Act of Sept. 18, 1940, ch. 722, tit. I § 1, 54 Stat. 899, which amended the Interstate Commerce Act, set forth the "National Transportation Policy":

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of develop-

However, the Commission has long been required "to give weight to the antitrust policy of the nation before approving mergers and consolidations."[11] The antitrust laws are expressly considered in section 5(11) of the Act which exempts carriers and individuals participating in an approved merger

> "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved ... , and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transactions."[12]

The Commission has been required to accommodate section 5(2) and the antitrust legislation due to the presence of the section 5(11) exemption[13] and the history of the development of the national transportation policy.[14]

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ing coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*"

49 U.S.C.A. (Historical note following table of contents). (Emphasis supplied.)

[11] Georgia v. Pennsylvania R.R., 1945, 324 U.S. 439, 456.

[12] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 76-77; 49 U.S.C. § 5 (11). In cases of affiliation of a motor carrier with a railroad, the Commission cannot approve the merger "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition." 49 U.S.C. § 5(2)(b).

[13] Minneapolis & St. L. R.R. v. United States, 1959, 361 U.S. 173, 186.

[14] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79.

In giving weight to antitrust policy as a factor in the "public interest," plaintiff Florida East Coast contends that the Commission must define the "line of commerce" (relevant product, or services, market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly."[15]

On its face this contention may seem contrary to the Supreme Court's decision in *McLean Trucking Co.* v. *United States*.[16] *McLean* involved the Commission's approval of the consolidation of seven large motor carriers. The most

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[15] Section 7 of the Clayton Act provides in part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.
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> . . . . . .
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> "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . ."

15 U.S.C. § 18.

[16] 321 U.S. 67 (1944).

important effect of the merger was to create an end-to-end consolidation from points in the far South to New England, with obviously large possibilities for through service.[17] The order approving the consolidation was attacked on the ground that the merger, notwithstanding Commission approval, violated the Sherman Act[18] and, hence, the Commission had no power to approve the merger. The Court decided that the Commission is not required to decide definitively whether the transaction violated the Sherman Act, but that the Commission's role is to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all trasnportation policy."[19] However, *McLean* does not dispose of the plaintiff's contention. Basic to the Court's determination in that case was the holding that the Commission has no jurisdiction to enforce the proscriptions of the Sherman Act. The Court stated:

> "To secure the continuous, close and informal supervision which enforcement of legislative mandates frequently requires, Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. Thus here, *the Commission has no power to enforce the Sherman Act as such. It cannot decide stitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act.* The Commission's task

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[17] See *id.* at 71.

[18] See 15 U.S.C. §§ 1-3.

[19] *Id.* at 87.

> is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action."

321 U.S. at 79-80 (Emphasis supplied.) In sharp constrast to the Commission's lack of jurisdiction to enforce the Sherman Act, Congress by section 11 of the Clayton Act has entrusted the Commission with authority to enforce compliance with section 7 and other Clayton Act provisions "where applicable to common carriers" under the Commission's jurisdiction.[20] While "the Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems," the Clayton Act legislation constitutes an additional "frame of reference within which the Commission operates."[21]

We think *Minneapolis & St. L. Ry.* v. *United States*,[22] a decision more recent than *McLean*, recognizes that the Commission's estimate of the scope and appraisal of the effects of any curtailment of competition which might result from a merger is to be initially and properly approached in terms of whether the effect is "substantially to lessen competition, or to tend to create a monopoly." In *Minneapolis* the Commission found that a proposed railroad acquisition "would not result in any significant [much less substantial] lessening of competition."[23] Its determination was said to rest upon "adequate findings."[24]

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[20] 15 U.S.C. § 21. See Georgia v. Pennsylvania R. R., 1945, 324 U.S. 439, 456 and n. 9.

[21] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 79-80.

[22] 361 U.S. 173 (1959).

[23] *Id.* at 188, 189.

[24] *Id.* at 189.

There is an additional reason why the Commission is required to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger. It would seem that the Commission is required to "give weight" to antitrust policy in section 5(2) proceeding only if the merger has the probable anticompetitive effect proscribed by section 7 of the Clayton Act. More specifically, when the effect of a proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country," the prohibition of the Clayton Act must be given weight. Conversely, when the proposed merger would not so result, the Commission is not required to give weight to antitrust policy. The Commission impliedly recognizes such a principle in its finding in the present case that the reduction of rail competition caused by the proposed merger will not be substantial. 320 I.C.C. 167.

Furthermore, it has long been settled that "immunity from the antitrust laws is not lightly implied."[25] When an agency, such as the Interstate Commerce Commission, is entrusted by Congress with authority to require compliance with section 7 of the Clayton Act,[26] and also to grant relief from the operation of the antitrust laws,[27] the logical corollary would be that the Commission will not grant immunity from the antitrust laws unless clearly authorized by the law and required by the evidence.

For that policy to have any real substance the Commission is required to determine whether or not the effect of the proposed merger "may be substantially to lessen competition" or "to tend to create a monopoly," "in any line of commerce in any section of the country." That does not

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[25] See, *e.g.*, *United States v. Philadelphia Nat'l Bank*, 1963, 374 U.S. 321, 348.

[26] 15 U.S.C. § 21.

[27] 49 U.S.C. § 5(11).

mean that the Commission may authorize only those acquisitions which would not offend section 7 of the Clayton Act.[28] The Commission with propriety may approve a rail consolidation, otherwise prohibited by the antitrust laws, in order to bring about needed or desirable improvement in service and economies in operation.[29] In other words, if the Commission finds that the policy of the Transportation Act would be thwarted unless a particular type of merger or consolidation were permitted, it would be authorized to approve the merger or consolidation, although the transaction would otherwise violate section 7 of the Clayton Act.[30]

Concomitant to the Commission's determination of whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly," the Commission must define the area of effective competition by reference to a product, or service market (the "line of commerce") and a geographic market (the "section of the country").[31]

We note that in *Minneapolis & St. L. Ry., supra,* which considered both the Sherman Act and section 7 of the Clayton Act, the Supreme Court did not expressly direct the Commission to define the relevant market by delineating a service market and a geographical market. However, that case was decided prior to *Brown Shoe Co.* v. *United States,* 1962, 370 U.S. 294. *Brown Shoe* was the first case to consider the background of the 1950 amendments to section 7 of the Clayton Act. In *Brown Shoe,* the Supreme Court set forth directions for measuring the rele-

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[28] See Minneapolis & St. L. Ry. v. United States, 1959, 361 U.S. 173, 187.

[29] See McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 78.

[30] See *id.* at 94 (dissenting opinion).

[31] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 324.

vant market within which the anticompetitive effects of a merger are to be judged.[32]

There is an additional reason for requiring the Commission to determine the product market and the geographic locus of competition. The Commission imposed routing and gateway conditions for the benefit of the intervening railroads to offset possible diversion of traffic by the merged company. It noted that "absent suitable protective conditions and consideration of these factors [the public advantage that will accrue from the merger], there is a distinct possibility that the proposed transaction would tend to lessen competition to an extent which would contravene the policy underlying the antitrust laws."[33] We think it clear as the Commission has recognized, that routing and gateway conditions bear a distinct relationship to the possible anticompetitive effects of the merger. Moreover, we do not think routing and gateway conditions can be meaningful in terms of the "public interest" as affected by the Clayton Act unless they are imposed by reference to the product market and the geographic market. The Commission's primary concern is the "public interest,"

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[32] Although Minneapolis & St. L. Ry. was decided in 1959, it is clear that only section 7 of the Clayton Act as enacted in 1914 was involved in that case and dealt with by the Court. See 361 U.S. at 185 & n. 11. The Court stated that "section 5(11) is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act . . . ." 361 U.S. at 186. However, the 1950 amendment to the section 7 of the Clayton Act is later in time than either section 5(11) or section 5(2) of the Interstate Commerce Act. Compare 15 U.S.C.A. § 18 (Historical note), with 49 U.S.C.A. § 5(2) (Historical note) and 49 U.S.C.A. § 5(11) (Historical note).

[33] 320 I.C.C. at 167. Compare 320 I.C.C. at 188. "We are convinced that these routing and gateway conditions will establish two balanced competitive systems in that area and will result in an increase rather than decrease in intramodal rail competition that will contribute to the present and future economic development of this important section of the Nation."

not "private interest." To impose routing and gateway conditions outside the context of the relevant markets either fails to employ Clayton Act standards as relevant to the public interest or assumes that private interest is consistently compatible with the public interest.

Therefore, we hold that the Commission must define the "line of commerce" and "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly." The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts.[34] If an erroneous statutory construction lies hidden in vague or insufficient findings then important statutory prerequisites to merger may be overlooked.[35]

Applying that holding to the present case, we conclude that the Commission has failed to make sufficient findings to accommodate section 5(2) of the Interstate Commerce Act with section 7 of the Clayton Act.

The Commission's conclusion concerning the anticompetitive effects of the proposed merger is reflected in its following statement:

> "Except in portions of Florida, the over-all reduction in rail competition in the Southeastern States will be relatively moderate and inconsequential when viewed

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[34] In a recent article Professor Handler and Mr. Robinson have noted that "whatever the guidelines for ascertaining whether a merger may have the proscribed anticompetitive effects, they are not in the legislative text and must inevitably be defined by the highest court." Handler & Robinson, *The Supreme Court v. Corporate Mergers*, Fortune, January, 1965.

[35] See United States v. Carolina Carriers Corp., 1942, 315 U.S. 475, 489.

> in the light of the alternative rail service that will be provided by competitors of the merged company at most of the major industrial centers in the affected area. With few exceptions, vigorous rail competition will continue to flourish in the territory served by the merged company. The impact of any lessening of rail competition that might result from this merger will be minimized by the increasingly strong competition that the merged company will encounter from other modes of transportation."

320 I.C.C. at 211, 212. The Commission noted that Tampa and the central and western portions of Florida are served by no other railroads except Seaboard and Atlantic Coast Line. It recognized that the merger would supplant the duopoly with a rail monopoly. 320 I.C.C. at 164-165. The Commission's conclusion that the reduction of rail competition caused by the proposed merger would not be substantial, 320 I.C.C. at 167, was determined by reference to rail competition in the Southeastern States as a whole.[36] Furthermore, the Commission noted the growth in motor and water transportation service in recent years in Tampa and the surrounding area. See 320 I.C.C. at 152-53. And its conclusion that the reduction in competition that will result from the merger will have no appreciable injurious effect upon shippers and communities, 320 I.C.C. at 167,

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[36] The Supreme Court has noted that "if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed . . . .[by section 7]. To illustrate: If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger [under section 7] in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed." Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 337 & n. 65.

was apparently by reference to other modes of transportation—motor carriers, air carriers, water carriers and pipelines—operating in the Southeastern States.

It may be that the relevant geographical market is the Southeastern States as a whole. But the proper question to be asked in determining the appropriate "section of the country" is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."[37] The geographic market selected must both correspond to the commercial realities of the industry and be economically significant. Although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area.[38]

It may be that the relevant service market includes modes of transportation other than railroads. But the fact that other modes of transportation operate within the geographic area or areas, within which the anticompetitive effects of a merger are to be judged, is not determinative of the relevant service market. Similarly, reference to tonnage and dollar aggregates to show the decline of railroad transportation and rise of other modes of transportation, and such statistics as the number of truck registration in an area, are not, in themselves, determinative. The outer boundaries of a service market are to be determined by the reasonable interchangeability of use or the cross-elasticity of demand between the service itself and substitutes for it. It should be noted, however, that within this broad market, well-defined submarkets may exist, which in themselves constitute service markets for anti-

[37] United States v. Philadelphia Nat'l Bank, 1963, 374 U.S. 321, 357.

[38] See Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 336-37.

trust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the service's peculiar characteristics and uses, unique service facilities, distinct customers, distinct prices and sensitivity to price changes.[39]

The United States, acting through the Attorney General, requests that the merger of Seaboard Air Line and Atlantic Coast Line be *permanently* enjoined. While a three-judge district court has power to enjoin the *orders* of the Commission authorizing a merger, we doubt if such a court has the power to permanently enjoin the *merger*. See 28 U.S.C. § 2321. Furthermore, the three-judge district court is limited to determining whether the Commission made any errors of law, whether its action was arbitrary, capricious, or an abuse of its discretion, and, upon review of the whole record, whether its findings of fact are supported by substantial evidence.[40] The United States' request that this Court permanently enjoin the merger would require that the Court go beyond the present record. We would have to find that upon no set of facts which the applicants might present could the merger be found to be in the "public interest." For this Court to enjoin permanently the merger would require that we invade the long-established province of the Commission. Resolving such considerations is a complex task which requires extensive facilities, expert judgment and con-

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[39] See *id.* at 325. Thus it may be that railroads constitute at least a submarket for the transportation of heavy-loading, low value bulk commodities due to cost and service advantages available to railroads.

Just as a service submarket may have section 7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." See *id.* at 336.

[40] See Brotherhood of Maintenance of Way Employees v. United States, 221 F. Supp. 19, 24, *aff'd mem.*, 375 U.S. 216 (1963).

siderable knowledge of the transportation industry. The wisdom and experience of the Commission, not of the courts, must determine whether the proposed consolidation is "consistent with the public interest."[41] The United States' request for a permanent injunction against the merger is accordingly denied.

Intervening-plaintiff Railway Labor Executives' Association contends that the terms and conditions imposed by the Commission to protect the interests of the railroad employees affected are inadequate and violate section 5(2)(c)(4)[42] and section 5(2)(f)[43] of the Interstate Commerce Act and are unsupported by adequate, clear, and precise findings. The Association requests that the orders

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[41] McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 87-88.

[42] "In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others : . . . (4) the interest of the carrier employees affected." 49 U.S.C. § 5(2)(c)(4).

[43] "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. § 5(2)(f).

of the Commission should be declared invalid on these grounds. The Association's request, as its brief recognizes, is based on the assumption that the Commission's orders authorizing the merger are otherwise approved. Since the Commission's orders must be enjoined for the reasons discussed above, consideration of the Association's contentions would be premature at this time.

The Commission found that under the merger plan the Mercantile-Safe Deposit and Trust Company will acquire power to control the merged company. It would be premature at this time for this Court to pass upon the question of whether Mercantile's power of control would be consistent with the public interest without requiring it to be considered as a carrier under section 5(3)[44] of the Interstate Commerce Act.

The orders of the Interstate Commerce Commission served December 13, 1963 and March 6, 1964 authorizing a merger of the properties and franchises of Atlantic Coast Line Railroad Company into Seaboard Air Line Railroad Company will be anulled and set aside and the enforcement of said orders enjoined, all without prejudice to further proceedings before and further findings and orders by the Commisison not inconsistent with this opinion.

This the 13th day of May 1965.

/s/ Richard T. Rives
RICHARD T. RIVES
United States Circuit Judge

/s/ Bryan Simpson
BRYAN SIMPSON
United States District Judge

/s/ William A. McRae, Jr.
WILLIAM A. McRAE, JR.
United States District Judge

[44] 49 U.S.C. §5(3).

APPENDIX D

STATUTES INVOLVED

Interstate Commerce Act

Section 5(2)(b), 49 U.S.C. § 5(2)(b)

Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use

service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 5(2)(c), 49 U.S.C. § 5(2)(c)

In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(d), 49 U.S.C. § 5(2)(d)

The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

Section 5(11), 49 U.S.C. § 5(11)

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of

such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

The National Transportation Policy

54 Stat. 899, Sept. 10, 1940, 49 U.S.C. notes preceding Sections 1, 301, 901, and 1001

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and

maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Clayton Antitrust Act

Section 7, 15 U.S.C. § 18

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immedate lawful busness, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

Section 11, 15 U.S.C. § 21

(a) Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board, where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

Issuance of complaints for violations; hearing; intervention; filing of testimony; report; cease and desist orders; reopening and alteration of reports or orders

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a

notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and

alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of orders; jurisdiction; filing of petition and record of proceeding; conclusiveness of findings; additional evidence; modification of findings; finality of judgment and decree

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commis-

sion or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

Exclusive jurisdiction of Court of Appeals

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

Preference; liability under antitrust laws

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

Service of complaints, orders and other processes

(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

Finality of orders generally

(g) Any order issued under subsection (b) of this section shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed or

the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

Finality of orders modified by Supreme Court

(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

Finaltiy of orders modified by Court of Appeals

(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

Finality of orders issued on rehearing ordered by Court of Appeals or Supreme Court

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalties

(l) Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense.

APPENDIX E

Order

At a Session of the
INTERSTATE COMMERCE COMMISSION
held at its office in Washington, D. C.,
on the 2nd day of December A.D. 1963.

Fiance Docket No. 21215

SEABOARD AIRLINE RAILROAD COMPANY—
MERGER—ATLANTIC COAST LINE RAILROAD
COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD
COMPANY BONDS

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, oral argument having been heard, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report and the report of the hearing examiner is hereby referred to and made a part hereof:

It is ordered, That the motions of several interveners that the application be dismissed, be, and they are hereby, denied;

It is further ordered, That the petition of Florida East Coast Railway Company for further hearing be, and it is hereby denied;

It is further ordered, That subject to the terms, conditions and modifications referred to in the aforesaid report,

(a) the merger of the properties and franchises of the Atlantic Coast Line Railroad Company into the Seaboard Air Line Railroad Company (name to be changed to Seaboard Coast Line Railroad Company) for ownership, management and operation; (b) the acquisition by the latter of sole or joint control of carriers subsidiary to or affiliated with the Atlantic Coast Line Railroad

[2]

Company through ownership of stock or lease; (c) the acquisition by the Seaboard Air Line Railroad Company, as successor in interest, of trackage rights and joint use of certain lines of railroad now used by the Atlantic Coast Line Railroad Company; (d) the transfer of the outstanding motor carrier operating rights of Atlantic Coast Line Railroad Company to the Seaboard Air Line Railroad Company pursuant to the approved plan of merger; and (e) by virtue of such merger, the acquistion of control of Seaboard Air Line Railroad Company, the surviving corporation, by Atlantic Coast Line Company and in turn, the acquistion of indirect control of Seaboard Air Line Railroad Company by Mercantile-Safe Deposit and Trust Company, be, and they are hereby, approved and authorized.

It is further ordered, That (a) the issuance by Seaboard Air Line Railroad Company of 3,839,345 shares of $20 per share par value common stock and script certificates representing fractional shares in conversion of outstanding capital stock of the Atlantic Coast Line Railroad Company pursuant to the aforesaid plan of merger, and (b) the assumption by the said Seaboard Air Line Railroad Company of the obligations and liabilities of the Atlantic Coast Line Railroad Company existing on the date of the merger, including obligations of companies subsidiary to or affiliated with the latter, which are contingently guaranteed either

solely by Atlantic Coast Line Railroad Company, or jointly with other guarantors, upon the terms and for the purposes described, be, and they are hereby, authorized;

It is further ordered, That (a) the proposed Modification Indenture of the Atlantic Coast Line Railroad Company to the First, Second, Third and Fifth Supplemental Indentures, dated March 1, 1950, June 30, 1952, July 1, 1952, and March 1, 1955, respectively to its General Mortgage dated March 1, 1950, modifying the sinking fund requirements with respect to its Bonds of Series A, B, C and D, in the manner and form set forth in the application filed in Finance Docket No. 21254 and in the proposed Modification Indenture, all as described in the aforesaid report, be, and

[3]

it is hereby, authorized, contingent upon and concurrent with the consummation of the merger herein authorized, and (b) the Commission's Orders of May 26, 1950, in Finance Docket No. 16961; April 10, 1952, in Finance Docket No. 17667; June 23, 1952 ,in Finance Docket 17791; and March 25, 1955, in Finance Docket No. 18874 be, and they are hereby, modified accordingly;

It is further ordered, That, except as herein authorized, the aforesaid securities shall not be sold, pledged, repledged or otherwise disposed of by Seaboard Air Line Railroad Company, or by the Atlantic Coast Line Railroad Company, or by the merged company, unless or until so ordered or approved by the Commission;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said securities or dividends thereon on the part of the United States;

It is further ordered, That the merged company shall report concerning the matters involved herein in conform-

ity with the orders of the Commission, Division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the merged company, when establishing changes in tariffs, rates and charges as may be required in effectuation of transactions approved herein may do so upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and shall in schedules making such changes refer to this order by date and docket number;

It is further ordered, That if the authority herein granted is exercised, the merged company shall submit for the consideration and approval of the Commission three copies of the journal entries required to record the transactions authorized herein;

[4]

It is further ordered, That this certificate and order shall become effective from and after 30 days from the date of service;

And it is further ordered, That, if the authority granted in the certificate herein is not exercised within one year from the effective date of this order, it shall be of no further force and effect.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

APPENDIX F

Service Date
March 6, 1964

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of March A.D. 1964.

Finance Docket No. 21215

SEABOARD AIR LINE RAILROAD COMPANY—
MERGER—
ATLANTIC COAST LINE RAILROAD COMPANY

Finance Docket No. 21254

ATLANTIC COAST LINE RAILROAD
COMPANY BONDS

Upon consideration of the record in the above-entitled proceeding, of the petitions, filed January 13, 1964, on behalf of (a) Union Bag-Camp Paper Corporation, (b) Florida East Coast Railway Company, (c) Gulf, Mobile and Ohio Railroad Campany, (d) Illinois Central Railroad Company (including request for oral argument), (e) Central of Georgia Railway Company and Savannah & Atlanta Railway Company, (f) Southern Railway Company et al., and (g) Railway Labor Executives' Association, for reconsideration of the report and order of December 2, 1963; and of the reply of applicants, filed February 3, 1964; and

It appearing, That the employee-protective conditions set forth in *Southern Ry. Co.—Control—Central of Georgia*

Ry. Co., 317 I.C.C. 557, as supplemented in 317 I.C.C. 729, were imposed herein; that on February 27, 1964, the said conditions were clarified; and that such conditions as clarified are, and continue to be, applicable to this proceeding;

It further appearing, That, subject to certain restrictions, the Southern Railway Company operates over a line of the Atlantic Coast Line Railroad Company between Hardeeville, S.C., and Jacksonville, Fla., via Savannah, Ga., under trackage agreements with the said Atlantic Coast Line Railroad Company; that the said trackage agreements, as interpreted by the parties thereto, may preclude the Southern Railway Company from interchanging freight traffic at Savannah with either Central of Georgia Railway Company or the Savannah & Atlanta Railway Company in connection with movements to, from, or through the Jacksonville gateway;

It further appearing, That Condition 8, relating to the opening of the Jacksonville gateway by the merged company should be clarified and modified to require the Seaboard-Coast Line Railroad Company to provide the Central of Georgia Railway Company, the Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern Railway Company with the right to interchange freight traffic with the Southern Railway Company at Savannah in connection with movements to, from or through the Jacksonville gateway via the Hardeeville-Jacksonville segment;

And it further appearing, That, except as the petitions are granted for the purpose of the modification herein approved, the material matters set forth in the petitions have been considered by the Commission and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of by petitioners, that no showing has been made war-

ranting reconsideration of the said decision, and that further oral argument is unnecessary:

[2]

It is ordered, That the proceeding be, and it is hereby, reopened for reconsideration solely for the purpose of modifying Condition No. 8 of the routing and gateway conditions; and that the said condition be, and it is hereby, modified as follows:

Condition No. 8, after the word "gateway" at the end of Condition No. 8, delete period, insert comma in lieu of period, and add the following:

and, *Provided further* that the Seaboard Coast Line Railroad Company shall take such further action as may be necessary to permit the interchange of freight traffic between Southern Railway Company and Central of Georgia Railway Company, Savannah & Atlanta Railway Company and other affiliates and subsidiaries of the Southern at Savannah in connection with movements to, from, or through the Jacksonville gateway by the Southern Railway Company under existing trackage arrangements permitting operations by that rail carrier between Hardeeville and Jacksonville over a line of the Seaboard Coast Line Railroad Company.

It is further ordered, That in all other respects the said petitions be, and they are hereby, denied.

And it is further ordered, That the order of December 2, 1963, as herein modified, shall become effective from and after 35 days from the date of service.

By the Commission.

HAROLD D. MCCOY
Secretary

(SEAL)